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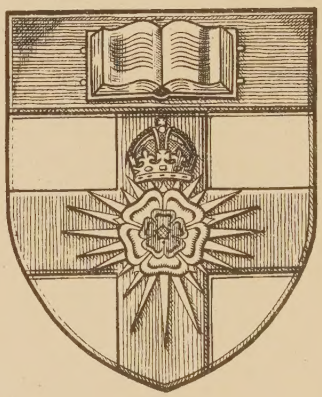

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LAW REPORTS.

529N

Division I.—Chancery.

CASES

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CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

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169	Title, and also throughout report	*Mitcalfe*	*Metcalfe*
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324	—12	26	25
328	13	26	25
500	4	Defendant	Plaintiff
823	—18	*Keymer* to *Taylor*	*Fox* to *Keymer*

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CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

WILSON *v.* CHURCH.

C. A.

1879

FRY, J.

April 22, 23, 24.

C. A.

May 19, 20, 22, 23, 26, 27, 28, 29, 30.

[1878 W. 81.]

Bondholders—Abortive Scheme—Failure of Consideration.

A concession having been granted by the Bolivian Government for a scheme for opening a communication between *Bolivia* and the *Atlantic* by the *Amazon*, a part of which scheme involved making a railway on Brazilian territory, for which a concession was obtained from the Government of *Brazil*, the *N. Company* was formed in *America* for effectuating the general scheme, and a limited company was formed in *London* for making the railway. In January, 1872 a prospectus was issued in *England* by the Bolivian Government and the two companies, inviting subscriptions to a loan for which bonds were to be given, the payment of which was to be secured by the general liability of the Bolivian Government and by the hypothecation of the customs duties on imports by the new route, and of the entire net profits of the company. It was further stated in the prospectus that the *C. Company*, who had had the line examined, had entered into a contract for making the railway, which was to be made within two years. It was also stated that out of the proceeds of the loan certain persons who were to act as trustees for the bondholders would retain a sum equal to the

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contract price of the railway, and apply it from time to time in payment for the works as they proceeded. The public took up the loan to a large amount. The *C. Company* had contracted to make the line for £600,000, and that amount was set apart out of the proceeds of the loan in pursuance of the prospectus. The rest of the money was paid partly to the Bolivian Government and partly to the *N. Company*, by whom it was expended. The *C. Company* commenced the works, but shortly afterwards repudiated the contract on the ground that they had been deceived. In September, 1873, a fresh contract was entered into with other persons for making the railway at a higher price. Nothing was done under this contract, and in August, 1875, it was transferred to another contractor. A dispute having occurred, the *N. Company*, in October, 1877, entered into another contract with other persons to make the railway, on terms which would make the cost greatly exceed £600,000, and which in some important particulars, as the Court of Appeal considered, were prejudicial to the rights of the bondholders. The Bolivian Government in the meantime revoked the concession. In March, 1878, a bondholder commenced an action on behalf of himself and all the bondholders except one, who was a Defendant, the Bolivian Government being a co-Plaintiff, to have the fund in the hands of the trustees divided among the bondholders, on the ground that the scheme had become abortive. It was admitted that the cost of making the railway would exceed the sum in the hands of the trustees. The shares in the *N. Company* had for the most part been allotted as fully paid-up shares, and nothing could be obtained from calls. The shares in the *Railway Company* had, by arrangements between the two companies, become the property of the *N. Company*, and there were no shareholders in the *Railway Company* liable to calls. It did not appear that there were any engineering difficulties making it impossible to construct the railway :—

Held, by *Fry*, J., that as there were no insuperable engineering difficulties, the scheme could not be pronounced impracticable; that the revocation of the concession by the Bolivian Government was unjustifiable, and one to which the Court ought not to give effect, and that the action must be dismissed.

Held, by the Court of Appeal, that as the funds in the hands of the trustees were admittedly insufficient to complete the railway, and the company had no means of raising further funds, it had become, in a business sense, impracticable to carry into effect the scheme, and to give the bondholders the security on the faith of which they advanced their money, and that they were entitled to have the fund, which was still *in medio*, in the hands of the trustees, returned to them:

Held, further, that assuming the revocation by the Bolivian Government of their concession to be unjustifiable (which in the opinion of the Court of Appeal it was not), still it was the act of a sovereign power with which the Court could not interfere, and made it impossible for the bondholders to have the security on the faith of which their money was advanced:

Held, also, that the dissent of some of the bondholders did not take away the right of the others to have their shares of the money returned to them on the ground of the scheme having become abortive.

An agreement had been entered into with the *C. Company*, by which they

were entitled to be paid out of the fund in question as the works proceeded. After they had incurred expenses in connection with the works, they repudiated the contract, on the ground that they had been induced to enter into it by misrepresentation:—

Held, that they had no lien on the fund for the expenses incurred by them.

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Affirmed with costs by the L. Justices 76

IN 1868, Colonel *Church*, an American, suggested to the Government of *Bolivia* a scheme for making a complete navigation from the interior of *Bolivia* down the *Rio Mamoré* and the *Rio Madeira* to the River *Amazon*, and so to the *Atlantic*. The *Rio Mamoré*, in the lower part of its course, forms the boundary between *Bolivia* and *Brazil*; it then takes the name of the *Madeira* and runs through Brazilian territory to the *Amazon*. In the lower part of the *Mamoré* and the upper part of the *Madeira* are rapids, making navigation impossible. The scheme first proposed was to avoid the rapids by means of a canal, but it was subsequently proposed to avoid them by means of a railway on Brazilian territory from a point on the *Rio Mamoré* above the rapids to a point on the *Rio Madeira* below them. The Bolivian Government entertained the scheme, and ultimately a concession, dated the 7th of December, 1869, was obtained from the Bolivian Government containing, among others, the following provisions:—

Art. 1. "Colonel *G. E. Church*, of *New York*, binds himself to organise a company in the *United States* or *Europe* to navigate by steam and with other vessels the rivers of *Bolivia* tributary to the *Madeira*, the principal affluent of the *Amazon*, with the nominal capital of 1,000,000 dollars in gold, which may be augmented according to the demands of the enterprise."

Art. 2. "This association shall be called the *National Bolivian Navigation Company*."

By Art. 3 the company bound itself to place at the first rapid of *San Antonio*, within twenty-one months from the day on which the company was notified that the privileges which the Bolivian Government undertook to obtain from *Brazil* had been granted, two steamers of certain specified descriptions.

Art. 4. "The Government of *Bolivia* binds itself to negotiate with the Imperial Government of *Brazil* the right to canalise the rapids which may be in Brazilian territory, or to remove the obstacles which form them by means of lateral canals, or in the

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manner which may be easiest to free the navigation of the *Maderia* from impediment, it being the obligation of the Bolivian Government to transfer this same right to the company." The Government of *Bolivia* also agreed to negotiate with *Brazil* for certain other privileges.

Art. 5. "The company agrees to commence the canalisation of the rapids which may be in Bolivian or Brazilian territory at the latest within the six months following the arrival of the first vessel."

Art. 6. The Bolivian Government conceded in favour of the company the privileges or rights in this article mentioned; being

(1.) Certain grants of land;

(2.) $10,000 gold the day the first steamer moved upon the waters of the *Mamoré;*

(3.) Rights of cutting wood and collecting cattle;

(4.) "No custom-house duty can be levied on any of the national products of *Bolivia* which may be exported *viâ* the *Amazon* during the term of the twenty-five years of the concession; but the Government agrees to establish custom-houses at the most appropriate points on the rivers to collect import duties upon all classes of foreign goods or manufactures which may enter by the same route. These duties shall be equal but not greater than those which may be collected upon importations made into *Bolivia viâ* the Pacific ports. As a subsidy, which the Bolivian Government concedes in aid of the *National Bolivian Navigation Company*, it awards to it, during the term of its concession, three-fourths part of the duties thus collected, which shall be delivered monthly to any agent appointed by the company to receive them."

(5.) The company was to have the right to issue bonds, and to hypothecate all its property and franchises of whatever nature. In case of issuing bonds the respective coupons were to be receivable at the river custom-houses at their nominal value in payment of three-fourths parts of the importation duties assigned to the company.

Art. 7. The *National Bolivian Navigation Company* was to have the exclusive privilege to navigate the rivers of *Bolivia*, affluents of the *Madeira*. This privilege was to date from the day upon which the present contract should be approved by the

Government, and was to continue until twenty-five years after the Government of *Bolivia* notified the company of the obtaining from *Brazil* of the privileges enumerated in Arts. 4, 8, and 9. This term expired, the company was to have the preference in any concession which it might be the desire to make to another company, but if it should not wish to make use of this right it was to enjoy for ever the free navigation of the same rivers.

Art. 8. The Bolivian Government ceded to the company a right to collect tolls of the vessels not belonging to the company which might make use of the canals, and bound itself to negotiate for the company an equal right from the Brazilian Government with respect to the embarkations which might use the canals to descend or ascend to Brazilian territory.

Art. 9. The company was to maintain all the canals in good condition, and to direct all the operations concerning them after the twenty-five years of the privilege, and for those expenses it was to have the right to collect from the embarkations mentioned in Art. 8 a sum sufficient to cover those expenditures.

Art. 13. The general direction of the company was to be located in the country where the company was formed. . . . The Government had the right to name a director to represent Bolivian interests and shareholders. For the present, Colonel *Quintin Quevedo* was named as said director. The president of the company was annually to forward to the Government through the Bolivian director a general balance shewing the condition of the enterprise.

Art. 16. The Government was to lend to the company all the protection it should demand, considering it a national enterprise. . . .

Art. 17. The Government of *Bolivia*, although preferring a canal to any other method of making the transit of the rapids, yet in case it should be found to be more appropriate to make that transit by means of a railroad, would agree that this should be done in conformity with the spirit of Arts. 4, 8, and 9.

Art. 18. In case the company might not be able to establish the steamers within the stipulated time, on account of obstacles of superior force (*fuerza mayor*), the term fixed was to be prorogued equitably and in conformity with the circumstances.

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On the 22nd of December, 1869, a contract referred to as "bases of loan" was entered into between the Bolivian Government and *Church* containing, among others, the following stipulations:—

(1.) "The Government of *Bolivia* agrees to loan its credit to the *National Bolivian Navigation Company* for the contracting of a loan in *Europe* according to the terms of these bases.

(2.) "There shall be negotiated in either of the markets of *Europe* a Bolivian loan of one and a half to two million of pounds sterling. The interest upon this loan shall be not less than 6 nor more than 8 per cent., with an amortization fund of 2 per cent. accumulative. This loan shall be emitted in the amounts and at the dates which may be judged most appropriate by the *National Bolivian Navigation Company.*

Art. 3. "In addition to the general guarantee which the Republic of *Bolivia* gives of its revenue and possessions for the payment of the interest and the total amortization of the loan, the following pledges or securities are especially named:—

"1. All the products of the fourth part of the duties collected by the Government upon the importations which may be made by the *Amazon*, and the total of the duties that may be collected after the expiration of the privilege of the company;

"2. The products of the three-fourth parts of the same duties belonging to the *National Bolivian Navigation Company;*

"3. The entire net gains of said company. In event these incomes should not be faithfully paid, the bondholders shall have the power to name an agent to receive them and remit them."

Art. 5. "From the net proceeds of the loan negotiated there shall be delivered to the Government 17 per cent. applicable to the amortization of the interior debt of *Bolivia* and the general regulation of its exchequer. The amount remaining, 83 per cent., shall be delivered to the *National Bolivian Navigation Company* to apply to the purchase of steamboats for the rivers, in the construction of moles and other works necessary for the service of the ports, in the construction of roads, canals, or any other works in general that may be in accord with the terms of the contract of navigation made between the Government and the company, and in addition to foster immigration to populate the lands conceded

to the company according to its desires, or which may be conceded in future for that object."

Art. 6. "An especial commission shall be named to see that the loan is employed for the purposes indicated in Art. 5. This commission shall consist of individuals named in equal numbers by Government, by the company, and, if it is demanded, by the bondholders."

Art. 8. "If after having invested the fund resulting from this loan according to the terms of Art. 5, it should be considered necessary by the Government and the company to raise a new loan for the uses of the company said supplementary loan to the extent of £500,000, shall be negotiated under the same guarantees and conditions as the present without the Government realizing 17 per cent."

Art. 9. "The Government shall name an agent invested with plenary powers to sign in its name the bonds of the loan which may be negotiated in conformity with these bases."

No commission was ever appointed under Art. 6. *Church* was appointed agent of the Bolivian Government under Art. 9.

On the 20th of April, 1870, the Brazilian Government granted a concession to *Church*, containing, among others, clauses to the following effect:—

1. The Government conceded to *Church* authority for the purpose of organising a company for the construction of a railway on the most appropriate system on the right bank of the Rivers *Madeira* and *Mamoré*. The enterprise was to be called the *Madeira and Mamoré Railway*.

3. The company was to have the exclusive privilege for the term of fifty years for the construction, disbursements, and enjoyment of the railway.

4. The incorporation of the company was to take place within the term of one year from the issue of the decree, and was not to be considered complete until the statutes of the company were registered in the appropriate *Tribunal de Commerce*. The works were to be commenced within the term of two years, and were to be completed and in good working order in seven years from the same date.

7. Grants of land along the course of the railway were made to the company.

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8 to 14 granted other privileges to the company.

19. Under guarantee of its stockholders the company, from its private property and the net profits of the road, was to have the power to contract loans by means of the emission of negotiable bonds.

On the 25th of June, 1870, the *National Bolivian Navigation Company* was incorporated by an Act of Congress of the *United States of America* with a nominal capital of $1,000,000, with power to increase the capital from time to time as might be necessary for the general purposes of the company. The company was organised in *New York* on the 30th of June, 1870, with a nominal capital of $2,500,000, and a board of nine directors, of which *Church* was president. *Church* transferred the Bolivian concession to the company in consideration of $2,000,000 in fully paid-up stock of the company. Of the remaining $500,000 stock $50,000 was given to an agent for commission, and $430,000 was sold to a Mr. *Irwin Davis* for £12,500. No shares were offered to the public.

On the 1st of March, 1871, a company was formed in *England* under the name of the *Madeira and Mamoré Company, Limited*, with a nominal capital of £1,500,000 in £20 shares. A board of five directors was appointed, *Church* being chairman. *Church* transferred the Brazilian concession to this company for £20,000, which, as it appeared, was paid to him out of the proceeds of the loan hereafter to be mentioned. With a trifling exception, nothing was ever paid upon the shares in this company, only 131 shares having ever been allotted.

In 1871 *Church* arranged terms with *Erlanger & Co.* for the issue of a Bolivian loan for public subscription. By a contract entered into by him on the 18th of May, 1871, as agent for the Bolivian Government, with *Erlanger & Co.*, it was agreed that the loan should be not less than £1,000,000 in bonds for £100 or £500 each, payable to bearer, with interest at £6 per cent., with a sinking fund of £2 per cent., and drawings by lot for the redemption of the loan. It was agreed that for the due payment of the interest and sinking fund the general revenues of *Bolivia* should be pledged. And also (1) the one-fourth share to which the Government was entitled in the customs duties on goods imported by way of the *Amazon*, (2) the three-fourths to which the *Navi-*

gation Company were entitled in the same duties, and (3) the net profits of the *Navigation Company*. By Art. 4 the Government engaged to make arrangements to the satisfaction of *Erlanger & Co.* for the receipt and remittance of the customs duties, and not to reduce the customs duties by way of the *Amazon* in any way which might impair the security of the bondholders. By Art. 8 the net proceeds of the loan were to be placed by *Erlanger & Co.* on deposit at the *Bank of England* to be disposed of as directed by the Government of *Bolivia*. By Art. 9 *Erlanger & Co.*, before making the deposit, were to deduct commission, charges, and expenses of issue, and a sum of £10,000, to be held subject to the draft of the Government of *Bolivia*, and were to retain out of the deposit a sum sufficient to meet the three coupons first falling due and the £2 per cent. first falling due for the sinking fund. By Art. 13 *Erlanger & Co.* were to advance to the Government, by anticipation, a sum of £10,000 as soon as the contract was ratified by the Government.

By another contract also dated the 18th of May, 1871, made between *Church*, as agent of the Bolivian Government, and *Erlanger & Co.*, the Government, under the rights reserved to it by Art. 8 of the former contract, disposed of the net proceeds of the loan as follows:—First, there was to be deducted therefrom a sum sufficient to pay *Erlanger & Co.'s* commission of £5 per cent., and the charge for engraving and executing the bonds, and for stamps; secondly, there was to be retained, as provided by Art. 9 of the prior contract, a sum sufficient for the purposes there mentioned; thirdly, there was to be paid to the *Navigation Company* 83 per cent. of the remainder after deducting the above two sums; and fourthly, the residue was to be paid into the *Bank of England* to the credit of the Bolivian Government after deducting therefrom the sum of £10,000, which *Erlanger & Co.* were to advance under clause 13 of the above contract of even date.

These contracts were ratified by the Bolivian Government.

By a contract of the 18th of May, 1871 (called "the security contract"), between the *Navigation Company* and *Erlanger & Co.*, the company transferred to *Erlanger & Co.* the three-fourths of the above-mentioned customs duties and the entire net profits of

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the company, such net profits consisting of any sums of money received by the company from any sources of revenue to which it then was or might thereafter become entitled after payment of the expenses and charges incurred in earning its revenue, but before deducting any sum whatever for the benefit of or division among the shareholders of the company, upon trust, 1, that *Erlanger & Co.* should receive the three-fourths of the duties, and apply the same, with the remaining one-fourth in payment of the sinking fund of the loan, and pay any surplus of the three-fourths to the *Navigation Company;* 2, that *Erlanger & Co.* should not be entitled to receive from the *Navigation Company* any portion of its net profits unless the customs duties were insufficient to meet the payments due for interest and sinking fund of the loan; 3, that in default of payment of such net profits *Erlanger & Co.* might enter as receivers into receipt of the revenues of the company; and, 5, that the security might be transferred by *Erlanger & Co.* to trustees to be nominated by them on behalf of the bondholders.

On the same 18th of May, 1871, a contract, referred to as "the works contract," was entered into between *Church* (as representing the *Navigation* and *Railway Companies*), *Erlanger & Co.*, and the *Public Works Construction Company*, by which the last-named company undertook to make the railway under a detailed contract to be made within one month after the issue of the loan, or after the receipt of the report of the engineer of the *Public Works Company*, whichever should last happen; and by Art. 5 *Church* agreed that so much of the net proceeds of the Bolivian Loan belonging to the *Navigation Company* as should be equal to the contract price should be invested in *United States* securities, and deposited in the *Bank of England* in the joint names of *Erlanger & Co.* and of the *Railway Company*, to be applied from time to time in payment for the contract works as they should proceed in accordance with the terms of the detailed contract.

The final arrangements for the issue of the loan were made on the 19th of January, 1872, and were contained in five documents of that date.

The first was a contract between the *Navigation Company* and the *Railway Company* and the *Public Works Company*,

by which the *Public Works Company* undertook to make the line for £600,000, with provisions as to extra works. By clause 13 £50,000 was to be paid to the *Public Works Company* on notice to them to commence the works, and was to be repaid by a retention of 8 per cent. on each certificate, and payment of the amounts of the engineer's certificates was to be made out of the net proceeds of the loan invested and deposited in the *Bank of England*, so far as such proceeds would extend, and the balance, if any, was to be paid by the *Navigation Company* and the *Railway Company*.

The second was an agreement between the *Navigation Company* and the *Railway Company*, by which, after a recital that the *Railway Company* had incurred liabilities to the extent of £21,000 in connection with the undertaking, it was agreed that the *Navigation Company* should pay to the *Railway Company* the £20,000, and provide, upon request in writing by the *Railway Company*, all moneys required for the purchase of land and the construction and equipping of the railway, and such further sums as might be requisite for putting the railway in full working order, and for the maintenance thereof till the traffic receipts were sufficient to pay expenses. In consideration of the sums of money to be provided by the *Navigation Company* the *Railway Company* were to issue or transfer to the *Navigation Company*, or their nominees, as fully paid-up shares, all the unallotted share capital of the *Railway Company*, and were to give a bond pledging the net receipts of the undertaking to the *Navigation Company* in aid of their arrangements for providing funds as above.

The third document was the bond thus agreed to be given.

The fourth document was an agreement made between Baron *Erlanger*, as representing *Erlanger & Co.*, of the first part, *Church*, on behalf of the Bolivian Government and the *Navigation Company*, of the second part, the *Navigation Company* of the third part, the *Railway Company* of the fourth part, and *Lloyd & Wanklyn* of the fifth part, by which *Erlanger & Co.* nominated *Lloyd & Wanklyn* trustees for the bondholders, and covenanted to retain out of the deposit mentioned in Art. 9 of the first contract of the 18th of May, 1871, a sum sufficient to meet the three coupons first falling due, and the £2 per cent. first falling due

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for the sinking fund, and hand the same over to the trustees to be applied in making those payments. *Erlanger & Co.* and the *Railway Company*, with the consent of the *Navigation Company*, covenanted with the trustees to apply the net proceeds of the loan which *Erlanger & Co.* bound themselves to deposit in manner provided by Art. 5 of the works contract of the 18th of May, 1871, and the interest thereon in payment to the *Public Works Company* for the contract works as they proceeded, in accordance with the terms of the detailed contract. The *Railway Company* assigned to the trustees the net profits of the railway upon trust to apply them to the same purposes and on the same terms and conditions as were in the security contract firstly, secondly, and thirdly declared concerning the net profits of the *Navigation Company*.

The fifth document was a bond executed by agents on behalf of the Bolivian Government, of which the 12th clause was as follows:—

"12. The payment of the interest and sinking fund of the said bonds is guaranteed by the solemn pledge of the good faith and general revenues of the Republic of *Bolivia*, and specially by the hypothecation (1) of the one-fourth belonging to the Republic of the entire customs dues to be collected on imports into *Bolivia viâ* the *Amazon* River; (2) of the other three-fourths of the same customs dues which belong to the *National Bolivian Navigation Company* under a previous concession from the said Government, which three-fourths are further specially charged by the said *Navigation Company* for the same purposes by a contract dated the 18th of May, 1871; (3) of the entire net profits of the said *National Bolivian Navigation Company*, which profits are also pledged for the like purposes by the last-mentioned contract."

On the 20th of January, 1872, the loan was issued for public subscription under a prospectus, the most material part of which was as follows:—

"Republic of *Bolivia*.

"6 per cent. Government Loan of £1,700,000 nominal capital in bonds of £100 and £500.

"Authorized by Act of Congress and approved by the President

of the Republic, August 28, 1871. Redeemable at par by means of an accumulative sinking fund of 2 per cent. per annum.

"The principal object of the loan is to subsidize the *National Bolivian Navigation Company* formed under concession from *Bolivia* for the purpose of opening communication between the Republic and the *Atlantic Ocean.*

"In view of the international importance of the operations of that company, the Congress of the *United States of America* has granted to it a charter, and its board is composed of gentlemen of the highest standing in the *United States.*

"The new route will be established by means of steamers and a railway about 150 miles in length around the rapids of the River *Madeira,* for which the Brazilian Government has granted a concession for fifty years to the *Madeira and Mamoré Railway Company,* of which the *Navigation Company* is practically the exclusive proprietor.

"The *Public Works Construction Company, Limited,* who have had the line examined, have entered into a contract for the construction of the railway, and the same is to be completed and equipped within two years.

"It is calculated that the effect of the new route will be to reduce the distance of the trade centres of *Bolivia* from *Europe* and the *United States* from about 180 days to about 30 days, and the cost of freight from an average of £55 per ton to about £15.

"The loan is guaranteed by the general revenues of the Republic, and by a first charge on the entire customs dues collected on imports into *Bolivia viâ* the *Amazon* River . . . As a further security for the loan, the *National Bolivian Navigation Company* has executed a deed granting to trustees for the bondholders a first charge over its net revenues from every source, and containing full powers for the inspection of books and accounts, and, in case of profit being withheld, for entering at once as receivers into possession of all property and assets.

"The *Madeira and Mamoré Railway Company* has joined in a similar deed hypothecating its net profits to the same trustees for the same purposes.

"Mr. *J. H. Lloyd* and Mr. *J. B. Wanklyn* will act as trustees for the bondholders, to exercise, if ever required, their powers for the

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protection of the bondholders. They will retain out of the proceeds of the loan as received a sum equal to the contract price of the railway, and temporarily invest and apply the same from time to time in payment for the works as they proceed. They will also retain and temporarily invest the amount of one drawing of the loan and three interest coupons, so as to cover the period fixed for completion of the railway and works."

The whole amount of the loan was taken up by the public, and out of the £1,700,000 received £187,000 was set apart in the hands of the trustees to meet the first three coupons and the first payment of the sinking fund, and, after providing for the expenses of issue, 17 per cent. of the balance was paid to the Bolivian Government, and 83 per cent., or £708,227 was set apart for the *Navigation Company*. Out of this the sum of £600,000, being a sum equal to the contract price of the railway, was paid to trustees according to the representations in the prospectus, and the residue was paid to the *Navigation Company*. The *Public Works Company* commenced the construction of the railway and received in all about £75,744 out of the £600,000. The remainder, with an accumulation of interest, was the fund to which the present action related. *Lambert* was afterwards appointed a trustee in the place of *Wanklyn*.

The *Public Works Company* subsequently ascertained that the line, instead of being about 150 miles in length, would have to be of the length of at least 180 miles, and in June, 1873, they repudiated their contract, alleging that they had been induced to enter into it by misrepresentation.

On the 9th of July, 1873, the *Public Works Company* filed a bill in Chancery against the *Navigation Company*, the *Railway Company*, and *Church*, to have the contract rescinded.

On the 7th of August, 1873, the *Navigation Company* commenced an action at Common Law against the *Public Works Company* for breach of contract.

On the 20th of August, 1873, the *Navigation Company* and the *Railway Company* filed their bill in Chancery against the *Public Works Company* and the trustees of the fund, claiming to be entitled to the fund by reason of the *Public Works Company* having repudiated their contract.

On the 13th of January, 1874, a bill in Chancery was filed on behalf of the bondholders against the trustees, the *Navigation* and *Railway Companies*, the Republic of *Bolivia*, and *Church*, asking to have the trusts of the fund carried into execution, and, if the construction of the railway had become impracticable, to have the fund divided among the bondholders.

On the 4th of May, 1874, the Republic of *Bolivia* filed a bill in Chancery against the *Navigation* and *Railway Companies*, *Church*, and the trustees, asking to have it declared that the trust fund was the property of the Republic.

In September, 1873, the *Navigation* and *Railway Companies* entered into a contract with Messrs. *Dorsey* and *Caldwell* for the construction of the railway at £6000 per mile.

In October, 1874, the suit by the *Public Works Company* was compromised by an agreement under the seals of the three companies, to which *Caldwell* was a party, upon the terms that all charges of misrepresentation should be withdrawn, and that the *Public Works Company* should receive £45,000 in manner therein mentioned, namely, 7½ per cent. of the amount of each payment to be made by the trustees on engineer's certificates of work done and materials supplied for the construction of the railway, as and when such payments were made, whoever might be employed in carrying out the works.

The suit by the *Navigation* and *Railway Companies* was heard and a decree made on the 11th of December, 1874, by the Master of the Rolls, declaring that the Plaintiffs were entitled to have the fund and the interest accrued and accruing thereon applied from time to time in payment for the works of the railway as such works proceeded, and that the trustees were bound to apply the same accordingly, but this decree was to be without prejudice to any claim of the Republic of *Bolivia*.

On the 22nd of November, 1876, the bills by the bondholders and by the Bolivian Government were both dismissed by the Master of the Rolls.

In the meantime, on the 25th of August, 1875, *Dorsey* and *Caldwell*, with the consent of the *Navigation* and *Railway Companies* had transferred their contract for the construction of the railway to *Reed Brothers & Co.*, and in January, 1877, the *Navi-*

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gation and *Railway Companies* called upon *Reed Brothers* to proceed with the construction of the railway. The contractors declining to do so, except on terms which were not approved of by the companies, the companies assumed to rescind the contract, and on the 25th of October, 1877, entered into a fresh contract with *P. & T. Collins*, of *Philadelphia*, for the construction of the railway. Part IV. of the contract, consisting of Arts. 20 to 25, fixed the contract price, not at a lump sum for the whole railway, but according to mileage prices, increased or diminished as to each mile, according to the excess or deficiency with reference to estimated average quantities of specified classes of work and materials, provision being made for including conveniences up to a fixed amount of £50,000 in the mileage prices, and for defining accurately what allowance should be made for extra work. Part V. of the contract, consisting of Arts. 26 to 47, provided for the provisional and final payments on account of the contract price. Art. 26: The said contract price, as defined in Arts. 20 to 25 inclusive, was to be paid to the contractors, in *London*, by the instalments, and in manner thereinafter mentioned. The *Navigation* and *Railway Companies* were to cause the said price to be paid out of the trust fund, so far as the same would extend; and when the trust fund was exhausted, the *Railway Company* were to pay the contractors the balance of such price in the debentures of the *Railway Company* (at par) of the kind and description stated in Art. 28 thereof, but if the *Railway Company* was unable to obtain the guarantee of the Imperial Government of *Brazil* for a sufficient amount of debentures to pay the said balance, the deficiency was to be paid in cash. By Art. 27 the *Navigation* and *Railway Companies* jointly and severally declared and agreed that, except as to the amounts properly payable out of the trust fund for their own reimbursement, as mentioned in a recital of the contract, and for the costs and allowances of administering the trust fund, and subject to the provisions of Art. 19 (which were provisions made in case of default on the part of the contractors), the whole of the trust fund should be applicable only to payment to the contractors of the sums to become due to them for constructing the railway and works under this contract as the works proceeded. Art. 28: The debentures in

which payment was to be made under Art. 26 were, unless otherwise agreed on by the *Railway Company* and the contractors, to be to bearer for the sum of £100 each, and were to carry interest at the rate of £7 per cent. per annum, payable half-yearly, on coupons to be attached to the debentures, the principal being made payable in thirty years from the commencement of the Imperial guarantee, the principal and interest to be payable in *London*, in sterling, free of all Brazilian taxes; and the payment of the interest as aforesaid for not less than thirty years to be guaranteed by the Imperial Government of *Brazil*, which guarantee the *Railway Company* and the *Navigation Company* bound themselves respectively to do their best to obtain. Art. 45: In case, through causes beyond the control of the *Navigation* and *Railway Companies*, the payments in debentures or otherwise could not be made when they fell due, the contractors were to be entitled to receive an equivalent amount out of the security fund; which was to be replaced by the *Railway Company* out of the amount in respect of which default should have been made, but this was to be without prejudice to the provisions on the subject in other articles. Art. 46: Delivery of the railway to the *Railway Company* was not to be given unless and until the contractors should have received payment in cash or debentures, in accordance with this contract, of all the sums they should be entitled thereunder to receive; and if such payment should not be made at or before the completion of the railway, the delivery to the *Railway Company* was to be postponed, and in the first place was to be given to a manager and receiver of the railway, to be appointed by the contractors, with the necessary subordinates to work the same, who should hold and work the railway for and on behalf of the contractors, and otherwise act in relation to the railway as if the contractors were mortgagees thereof in possession, until the amount due to them was paid in cash or debentures in accordance with this contract; it being agreed that the contractors should have a lien upon the railway until they should have been so paid, but no longer: and the contractors were to apply the revenues arising from the working, first in payment of the expenses thereof, and were at liberty to apply the surplus in or towards payment of the sums remaining due to them under this

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contract, either in cash or debentures; or in case the *Railway Company* should have debentures of the kind mentioned in Art. 28, which the contractors should be entitled to receive, the contractors were to be at liberty to retain the said surplus until the *Railway Company* should deliver to them such debentures. The contractors were, while so in possession, to have full discretion as to the manner of working the said railway (subject to the provisions of the Brazilian concession), and the appointment, removal, and salaries of the manager and all subordinates, and were not to be responsible for any involuntary losses or errors in judgment. Art. 47: If the contractors should be unable to obtain all or any of the cash payments out of the trust fund to which they should become entitled under this contract, as and when the same payments should respectively become payable, or if the *Railway Company* (after the guarantee of the Imperial Government mentioned in Art. 28 should have been given) should commit default in making all or any of the debenture payments to which the contractors should in like manner become entitled, as the same should respectively become payable, or if default were made in the performance of any other of the covenants of this contract to be by the *Railway Company* and the *Navigation Company* kept and performed, the contractors were to have the right to suspend the works; and if such default in payment should continue for the space of four months, the contractors were to have the right, if they should think fit, to put an end to the contract, without prejudice to any claim which they might have against the *Railway Company* or the *Navigation Company* under the same for such default or otherwise.

In March, 1877, an agreement was entered into between the Bolivian Government and an agent for a committee of the bondholders, by which the Government made over to the bondholders all its rights in respect of the fund in the hands of the trustees, and the bondholders gave up all claim against the Government in respect of the loan. There was some conflict of evidence as to whether the Bolivian Government had revoked its concession, but the Court of Appeal considered it to be established that there had been such revocation.

The first certificate for payment under the *Collins* contract was

given on the 19th of February, 1878, but the trustees, in consequence of a notice received from the committee of bondholders, refused to make any payment, and on the 2nd of March, 1878, the present action was commenced. The claim was several times amended, and ultimately was by *Wilson*, on behalf of himself and all the bondholders except *Nash*, and by the Bolivian Government against the *Navigation Company*, the *Railway Company*, the *Public Works Company*, the trustees, and *Nash*. *Church* was originally made a Defendant, but was dismissed before the hearing. The institution of the action was determined upon at meetings of the bondholders, a large majority of whom sanctioned the proceedings, and none, except *Nash*, actively dissented. The statement of claim alleged, among other things, that *Church* obtained the Bolivian concession by false representations made to the Bolivian Government; that he was bound to organise a company with an amount of capital to consist of $1,000,000 in gold; that the difficulties of constructing the railway, owing to the nature of the country and other circumstances, were insuperable; that the *Collins* contract had been entered into on the basis that the railway would be 180 miles long at least, and that the contractors were to be paid £5900 per mile, which would bring the cost up to about £1,062,000; that the two years within which it was held out that the railway could and would be constructed had expired; but upon all trustworthy information the railway, even if sufficient funds were forthcoming, and the difficulties were not practically insuperable, could not be completed for many years; that the *Navigation* and *Railway Companies* never had any real capital except the money received out of the loan, but that arrangements had been made by *Church* and parties associated with him for the purpose of giving an illusory appearance of the companies having capital; that it was impossible for *Church* or the *Navigation Company*, owing to their want of funds, to fulfil the obligations of the Bolivian concession even if it were continuing, but that it was voidable in consequence of the false representations of *Church* and the non-performance by him and the *Navigation Company* of its conditions; that the Bolivian Government declined to recognise it as binding, and that the rights thereby granted had ceased; that the trust fund was only sufficient to pay a comparatively small

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portion of the cost; that there was no other fund available, and that any application of the trust fund upon the works could only lead to the expending a large sum of money on the partial construction of a railway to no purpose; that *Nash* was the holder of bonds to the amount of £3000 only, and had pecuniary interests antagonistic to the bondholders at large; and that the trust created by the prospectus had failed, and become incapable of being carried into effect. The Plaintiffs claimed that the fund should be returned to the bondholders.

The action came on for trial before Mr. Justice *Fry* on the 22nd of April, 1879.

Southgate, Q.C., *Fooks*, Q.C., *Day*, Q.C., *Whitehorne*, and *Cozens-Hardy*, for the Plaintiffs:—

The fact that one bondholder dissents is not a bar to the relief: *Pearce* v. *Piper* (1); *Buckly* v. *Cater* (2); *Reeve* v. *Parkins* (3).

The Court will put an end to a partnership which cannot be carried on profitably: *Baring* v. *Dix* (4); *Jennings* v. *Baddeley* (5).

The case is not *res judicata* by reason of any of the former suits: *Barker* v. *Walters* (6); *Moss* v. *Anglo-Egyptian Navigation Company* (7).

[FRY, J., referred to *Hunter* v. *Stewart* (8); *Johnstone* v. *Hall* (9).]

Benjamin, Q.C., *North*, Q.C., and *Rigby*, for the *Navigation Company*, the *Railway Company*, and *Nash*, contended that upon the evidence of the Plaintiffs their case failed, for that it was not shewn that the construction of the railway had become impossible, and that it was unnecessary to enter into evidence for the Defendants.

Romer, and *F. C. Norton*, for the *Public Works Construction Company*.

Macnaghten, and *Snagge*, for the trustees.

(1) 17 Ves. 1.
(2) Cited 17 Ves. 11.
(3) 2 Jac. & W. 390.
(4) 1 Cox, 213.
(5) 3 K. & J. 78.
(6) 8 Beav. 92, 97.
(7) Law Rep. 1 Ch. 108.
(8) 4 D. F. & J. 168.
(9) 2 K. & J. 414.

Southgate, in reply.

FRY, J.:—

Mr. *Benjamin,* on behalf of the principal Defendants in this case, asks me to nonsuit the Plaintiffs on the opening of the case, and that is the question which I am now about to determine.

There is a sum of upwards of £700,000 now in the *Bank of England,* invested, I believe, in *United States* securities, which represents 71 per cent. of a loan which was raised in this country by the Bolivian Government. The Plaintiffs in the action are Mr. *Wilson* (suing on behalf of himself and all other the holders of bonds of that loan except one Defendant, Mr. *Nash*) and the Republic of *Bolivia;* and they represent themselves as filling the character of lenders and borrowers of that loan. The Defendants are, in the first place, the *National Bolivian Navigation Company,* a company formed under an Act of the Congress of the *United States of America* for the purpose of improving the navigation of the rivers of *Bolivia.* There are also present as Defendants a railway company called the *Madeira* and *Mamoré Railway Company,* and another company, the *Public Works Construction Company* (both of whom I may dismiss from further consideration, because they in fact are claiming under the *Navigation Company*), Mr. *Nash* and the trustees.

Two classes of questions arise for consideration—the one between the bondholders themselves; the other between the bondholders (assuming that all of them are before me as Plaintiffs) and the Republic on the one hand, and the *Navigation Company* on the other, who claim to be the owners of this fund. The case put forward by the Plaintiffs is, in effect, of two kinds. In the first place they say, "We the borrowers and lenders have agreed together to put an end to the transaction between us of borrowing and lending and to require the money to be repaid to the lenders." Now, undoubtedly, borrowers and lenders concurring may put an end to a transaction of loan and require the repayment of the money which has been placed in the hands of third persons, provided all the borrowers and all the lenders assent, and provided the money still remains the money of the borrowers or of the lenders. But if it has become the money of any third person

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they cannot, by convention between themselves, extinguish the rights of the third person. It therefore becomes material to consider in the first place, whether all the bondholders have agreed to rescind the transaction of the loan, and, in the second place, whether the money is or is not still the money of the borrowers or lenders, or, on the other hand, has become the money of any third person. Now, how does it stand with regard to the agreement between the bondholders themselves? It appears that something like four-fifths of the holders of bonds have practically agreed to the course which Mr. *Wilson* is taking on their behalf. They have come to an agreement through Mr. *Harris* with the Bolivian Government, the short effect of which is this: The bondholders release their rights against the Bolivian Government, and the Bolivian Government give up their claim upon this fund to the bondholders. But that agreement has not been assented to by a very considerable number of the bondholders, and it is dissented from by the Defendant Mr. *Nash*. Therefore I have a case in which, so far from all the holders agreeing to the course which the Plaintiffs desire me to follow, many are non-assenting, and one is dissenting. The basis, therefore, of the argument fails.

It is said that where there is a very large majority of persons having rights under independent contracts, and they agree to a particular course, and the Court can see that it is more expedient for the other persons who do not concur, that they should have entered into a similar agreement, the Court can make an agreement of that sort for them. I repudiate any such jurisdiction. No authority has been cited, or could be cited, for such a proposition.

I next proceed to inquire whether this money is now the money of the lenders or the borrowers, or has become the money of third persons, namely, of the *Navigation Company*. In order to answer that question, it is necessary to inquire into the history of this loan, and, in doing so, I must bear in mind that, if the *Navigation Company* have a good title to the money as against either of the Plaintiffs, it is impossible that I can take away that money from the *Navigation Company*. The whole matter originated in a concession of the 7th of December, 1869, made by the Bolivian Government to Colonel *Church*, who at that time was contem-

plating the formation of the company subsequently formed. By the first article of that concession, Colonel *Church* bound himself "to organise a company in the *United States* or *Europe* to navigate by steam or other vessels the rivers of *Bolivia* tributary to the *Madeira*, the principal affluent of the *Amazon*, with the nominal capital of one million of dollars in gold which may be augmented according to the demands of the enterprise." That association was to be called the *National Bolivian Navigation Company*. Now the State of *Bolivia* being an inland state, and the River *Madeira* and its tributaries flowing into the *Amazon* through the territory of *Brazil*, and there being in the territory of *Brazil* rapids which prevented the access by steam or other vessels from the *Amazon* to the Bolivian territory, it became necessary to provide some means of evading that difficulty. It was proposed to do this by canalisation of the portion of the river which was affected by the rapids. That portion of the river was, as to part, entirely in Brazilian territory, and, I believe, as to part the boundary between the two states. So nothing could be done without the assent of the Brazilian Government. Therefore it was provided that the Government of *Bolivia* should negotiate with the Imperial Government of *Brazil* for the right to canalise the rapids, and that when they obtained that concession they should transfer it to the *Navigation Company;* and thereupon (to use a short expression) "time was to run;" that was to be deemed the beginning of the enterprise. The Bolivian Government further conceded to the company certain important rights which gave them a very substantial interest in the result of the enterprise.

Shortly after the date of this concession, another agreement was entered into between the Bolivian Government and Colonel *Church*, as representing the intended company, which has been called the bases of the loan, and bears date the 22nd of the same month of December, 1869, which is a very important document as regards the question which I am now considering. By that agreement the Government of *Bolivia* agreed to loan its credit to the *Navigation Company* for the contracting of a loan in *Europe*, according to the terms of those bases. Then, after providing for the amount of the loan and the interest upon it, it was further

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provided that there should be pledged for the purposes of the payment of the interest and the amortization of the loan these further pledges or securities: the products of the one-fourth of what I may call the *Amazon's* customs which was to belong to the Government, the products of the three-fourths of those customs which had been assigned or made over by the concession to the *Navigation Company*, and the entire net gains of the company. It was further provided that 17 per cent. of the loan should be made over to the Government, and the amount remaining, 83 per cent., should be delivered to the *Navigation Company* to apply for the purchase of steamboats, for the construction of moles, and other works necessary for the service of the ports, in the construction of roads, canals, or any other works in general that might be in accord with the terms of the contract of navigation made between the Government and the company, and for other purposes. Then a further article provided that if it should be considered necessary by the Government and the company to raise a new loan for the uses of the company, a supplementary loan might be raised and should be raised. It was quite clear, therefore, that the Bolivian Government lent its credit or its power of raising money to a definite extent to the *Navigation Company*. In pursuance of the same arrangement Colonel *Church* was named as the agent of the Government to negotiate this loan in *Europe*. Accordingly, he came to this country, and through the intervention of the house of Messrs. *Erlanger*, arranged for the issue of a loan. Four documents were executed in May, 1871, with the view to the raising of that loan. By the first of them it was provided that the loan should be raised in a definite manner through Messrs. *Erlanger*, and that the proceeds should be placed by Messrs. *Erlanger* in deposit at the *Bank of England* to be disposed of as directed by the Government of the Republic. But by another instrument of the same date the Government, in exercise of the rights thus reserved, disposed of the proceeds in this manner: Certain sums were to be paid for commission, and there was to be paid to the *Navigation Company* 83 per cent. of the remainder after deducting certain sums. Therefore, to put it shortly, those contracts of 1871 gave effect to the original bases of the loan, which provided that 17 per cent. of the loan should go to the Government, and 83 per

cent. should belong to the company, to whom the Government had lent its power of borrowing. By a subsequent arrangement between the *Navigation Company* and the *Construction Company*, 71 per cent. of the loan was hypothecated and segregated in the hands of trustees as a fund for the purpose of paying the *Construction Company*. That fund is now represented by the sum to which I have already referred, of between £700,000 and £800,000; and was further dealt with in this way. When in January, 1872, the prospectus was issued, it contained the representation that the fund, so in the hands of the trustees, would be applied for the purposes of the making of the railway. The 71 per cent. of the loan which had originally, under the contract between the *Navigation Company* and the Government, belonged to the *Navigation Company*, was tied up by two chains—the one by a contract between themselves and the *Construction Company;* the other by a contract between themselves and the bondholders, which last dedicated it to the purposes of the railway, and which last is the ground of the decision of the Master of the Rolls in one of the numerous actions or suits which have arisen out of this loan, that that sum is to be applied for the purpose of making the railway. Now, that being the short effect of the agreements, the question arises to which I have already referred, whose money is this 71 per cent. of the loan; is it the money of the Government, or is it the money of the *Navigation Company?* I answer that it is the money of the *Navigation Company*. To the *Navigation Company*, as I have already pointed out, the Government lent this power of making the loan. To the *Navigation Company* the Government assigned 83 per cent. of the proceeds. They did it for certain definite purposes. It is not now material probably to consider whether that is a gift by the Government to the *Navigation Company*, but looking at the documents which have been entered into between them, it appears to me that it is a gift by the Government to the *Navigation Company*, subject to this, that as between the company and the Government, the profits resulting from the enterprise which is to be carried into effect by the *Navigation Company* are the primary fund out of which that loan is to be repaid, and that if the Government are called upon to pay any difference, or to pay the whole, they have no claim against

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the company, and, on the other hand, if the company pay that loan out of their profits they have no claim against the Government. It follows that, as in my judgment that money is the money of the *Navigation Company*, I cannot pay it to the Government unless one or other of two things has happened—either there has been a total failure of the original enterprise—a total subsidence, so to speak, of the common ground upon which the bondholders themselves were contracting with the Government and upon which the *Navigation Company* were contracting also with the Government, or there has been a valid revocation and rescission of the contract subsisting between the company and the Government. Accordingly the opening was directed chiefly to this point, that this enterprise had become impossible, and that the discovery of that impossibility relieved the fund from the declaration of trust which the Master of the Rolls had given effect to by his judgment in one of the previous suits. It is, therefore, a question of fact to be determined whether this enterprise has or has not become impossible. It appears to me that, so far from the evidence pointing to any conclusion of the sort, it shews the very opposite. [His Lordship here briefly stated his grounds for the conclusion that there were no engineering difficulties to make the construction of the railway impracticable.]

Then it is said that, if not impracticable, it is impracticable with the capital which the company itself was to have. But the answer is that there is no contract that the line shall be made for any particular sum. I cannot infer it. It appears to me that the general scheme of the concession was this: We, the Bolivian Government will give you, the company, certain benefits and a certain interest in the navigation of the rivers and the working of the railway, and we will trust to that interest as inducing you to do your duty, and to obtain the necessary capital, and to do the necessary works. It follows, therefore, that upon the ground of impossibility I cannot at this moment say that the concession has come to an end.

Now has the concession come to an end upon the ground of rescission? The rescission is said in this case to be justified on two grounds: first, on the ground of misrepresentation by Colonel *Church* in obtaining the concession of 1869. I see no ground

whatever for that contention. In the next place, it is said that there has been a non-performance by the *Navigation Company* which gave the Government a right to rescind. [His Lordship then stated his reasons for considering that the rescission was not justified on this ground.] But there are yet higher grounds taken. It is said that the Bolivian Government is a sovereign state, and is at liberty to revoke the concession, and that this Court must give effect to that revocation whether the Court considers that it is just or not. It does not appear to me that the Court is called upon to take away the money which I have determined to be the money of the *Navigation Company* upon the sole suggestion of the wrongful revocation by the Government of their concession, under which concession the money in this country has become the money of the concessionaires. This Court does not sit to give effect to the arbitrary decrees of foreign Governments, and when they come to sue as Plaintiffs in this Court, they must submit themselves to the ordinary position of a suitor, and shew that they have right on their side and not mere power.

There is only one other argument to which it appears to me necessary to refer. It has been argued that this money must be paid to the borrowers and lenders jointly, because the concession is not the subject-matter of an action for specific performance, and because the Court does not allow moneys to remain indefinitely *in medio*. That argument, of course, would be sound if it applied to the present case; but, in my judgment, it does not so apply, and for several reasons. In the first place, this is a contract to construct a certain railway in which both the contracting parties, the Government and the company, are to have a substantial interest. It is not possible for one of the persons who are interested in the work to say that he will put an end to the contract against another person who desires to have the contract carried on, and who is himself the person to do the work. But, further, the money has been paid over to the person who is to do the work, and he is interested in the money being laid out upon that work, and I am asked to take that money away from him on the ground that it is the money *in medio*. If I am right in the previous portion of my judgment, the money is not *in medio* at all; it has been paid by a person who contracted to pay it to

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another, who contracted to receive it to be applied by that person in the construction of a work in which both persons were interested. That argument, therefore, in my judgment, fails, and I accede to the argument that the Plaintiffs have shewn no case in their opening; and I dismiss this action with costs.

The Plaintiffs appealed. The appeal came on for hearing on the 19th of May.

Sir *H. Giffard*, S.G., *Southgate*, Q.C., *Fooks*, Q.C., *Whitehorne*, and *Cozens-Hardy*, for the Appellants:—

It is objected that the Plaintiffs cannot succeed because the bondholders are not unanimous, but the authorities shew that the Court will put an end to a partnership which has become impossible, notwithstanding the dissent of some of the partners: *Baring* v. *Dix* (1); *Jennings* v. *Baddeley* (2). It is argued that the decree in the former suit against the bondholders who were selected to represent the whole body was a *res judicata* by which the Plaintiffs are now estopped. But this is not the case. It was only a precedent, not a judgment binding them: *Barker* v. *Walters* (3).

Benjamin, Q.C., *North*, Q.C., and *Rigby*, for the *Navigation Company*, the *Railway Company*, and the Defendant *Nash*:—

The only real questions in this case are, first, whether the Plaintiffs can succeed, as they do not represent the whole of the bondholders; and, secondly, whether the carrying out of the undertaking is physically or financially impossible.

There was no trust created for the bondholders when the money was paid; the only trust was that the money should be applied in the making of the railway, and one party cannot set that trust aside unless all the others agree. The borrowers and lenders cannot agree to have the money returned if third parties have acquired rights. The Brazilian Government have a deep interest in the success of the enterprise. The loan was raised by the Bolivian Government, not for itself but for the *Navigation Com-*

(1) 1 Cox, 213. (2) 3 K. & J. 78.
(3) 8 Beav. 92, 97.

pany. They only lent their credit. The money was to belong to the *Navigation Company* for the purposes of their undertaking. The Bolivian Government had no right to the money, they were to look to the responsibility of the *Navigation Company* to complete the works. In the two previous suits the Bolivian Government and the bondholders were represented, and they are bound by the decisions in those suits, the effect of which is that the real bargain was that the money raised by the loan should be laid out in the construction of the railway. They cannot raise the same questions again in this fresh suit: *Commissioners of Sewers* v. *Gellatly* (1). Then as to the question whether the scheme is impracticable. We say that it is practicable both physically and financially.

[JAMES, L.J.:—After this lapse of time, the contract being that the railway should be constructed in two years from 1872, we think that the *onus* is on you to shew that the scheme is practicable. If you can strengthen your case by fresh evidence you ought to be allowed to call it, in order to satisfy us why the railway was not made.]

[The following evidence was then adduced:—A decree of the Brazilian Government, dated the 18th of January, 1879, empowering the executive to guarantee interest at 7 per cent. on £400,000 additional capital, when raised, to be laid out upon the works after the effective employment of the trust fund. Mr. *Collins*, one of the contractors under the *Collins* contract, was also examined in Court, and other oral evidence was given.]

Romer, and *F. C. Norton*, for the *Public Works Construction Company*:—

On the assumption that the Court will direct that, as between the Plaintiffs and the *Navigation Company*, the fund belongs to the Plaintiffs, we claim a lien on the fund to the extent of £45,000, which we are entitled to be paid by the *Navigation Company* in our action against them. The *Navigation Company* were the owners of the fund, *quâ* us; and the effect of our contract with them was the same as if this fund had been deposited by them in the hands of trustees for our security.

(1) 3 Ch. D. 610.

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[BRETT, L.J.:—How can you repudiate this contract, and at the same time claim the performance of any part of it?]

The contract was procured by misrepresentations, and therefore the party repudiating it is still entitled to have liabilities which he has incurred made good. The representations which were made to us as to the cost of labour were inaccurate; it was really double what was stated to us; and the length of the railway was nearly 200 miles instead of 157. We threw up the contract as soon as we discovered these misrepresentations, and treating the *Navigation Company* as the owners of the security fund, we are entitled to a lien on the fund for the amount already expended in carrying out the contract up to that time: *Middleton* v. *Magnay* (1); *Torrance* v. *Bolton* (2); *Thomas* v. *Buxton* (3).

If the *Navigation Company* were not the true owners of the fund *quâ* us, they were at all events the true owners as between us and the Plaintiffs. Until the commencement of this action the Plaintiffs allowed the *Navigation Company* to appear as the true owners of the fund or their agents in the disposition and management of it; and our contract with them is a good contract as against the Plaintiffs so far as it provides for our payment out of the fund. If necessary we are prepared to adduce evidence of the misrepresentations complained of, and to prove that the amount expended by the *Public Works Construction Company* exceeded £70,000, after giving credit for the £50,000 and the other moneys already paid.

JAMES, L.J.:—

It would be a mere waste of time to produce the evidence which you now tender, because, assuming all the facts to be as you state them, and that you had a right to rescind the contract on the grounds which you suggest, and that you could prove those grounds—assuming all that, it appears to me it would be utterly immaterial, and would only involve a waste of time. There are, no doubt, very singular cases, which have been cited by Mr. *Romer*, in regard to contracts for the sale and purchase of land. In some

(1) 2 H. & M. 233. (2) Law Rep. 8 Ch. 118.
(3) Law Rep. 8 Eq. 120.

cases a lien has been given upon the land for the loss which the purchaser or the intending lessee has sustained. There was a case before the late Master of the Rolls where a man purchased and did not get the property at the time at which he ought to have had it, and it was depreciated, and he was allowed to take out of his purchase-money that compensation which he would have been entitled to in a suit for specific performance, because he did not get the whole thing for which he had paid his purchase-money. But those are cases which stand by themselves. As to this case, it appears to me very simple. Gentlemen enter into a contract to do certain works, and a security fund was in terms given for the purpose of paying for the works as they should proceed. Then, for reasons good or bad, the persons who were to do the works, and to get payment out of that fund, elect to repudiate the contract; and it is impossible, as it seems to me, to say that they have any implied lien upon the fund which had been provided by a friend of the other party, or a lender of the other party, for the purpose of paying for the works. There is no lien, under a contract, for damages sustained by breach of that contract. That, as it seems to me, is sufficient to dispose of the case.

But if this had not been so, it appears to me that, whatever claim there might have been was completely put an end to by what was done between the *Public Works Company* and the *Navigation Company*. The *Navigation Company* brought their action against the *Public Works Company* for damages for breach of their contract. The *Public Works Company* filed a bill for the purpose of getting the contract rescinded on the ground of misrepresentation. Then, in the absence of any other person interested in the fund, the *Navigation Company*, the *Railway Company*, and the *Public Works Construction Company*, come to this arrangement: the *Public Works Company* withdraws all charges of misrepresentation against *Church* and the *Navigation* and *Railway Companies*—those two companies admit that from their later information the railroad could not have been built at the price and within the time named in the contract to the *Public Works Company*, and that, from a survey made by the *Public Works Company*, the length of the line appeared to be longer than was originally supposed; and that being so, the three companies agree

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to put an end to the litigation; the *Navigation Company* and the *Railway Company* release the *Public Works Company* from all claims for breach of contract, and the *Public Works Company* agrees to accept a certain sum to be paid in a certain way out of the payments for work to be done by Mr. *Caldwell*, if Mr. *Caldwell* did the works and got payment under them. He has not done that, and the arrangement with him has been put an end to. The *Public Works Company* accepted the particular right in respect of all the rights they had before. It is utterly impossible to say that this arrangement can be set aside in a suit in which the Plaintiffs are the Bolivian Government and the bondholders. It can only be set aside in an action properly constituted for that purpose. That compromise stands, and has determined their rights between themselves; the bondholders were no parties, directly or indirectly, to that compromise, and cannot be affected by it. That compromise cannot give the *Public Works Company* any right to the fund, except to the extent and manner provided for by that contract.

BRETT, L.J.:—

The fund contributed by the bondholders was deposited upon a trust under which it was to be handed over from time to time in payment for work done, and otherwise it was not to be handed over. This point is being argued upon the hypothesis that no such work has been done, and that no such work can be done, and that, therefore, as regards that trust, the money belongs to the bondholders and ought to be paid back to them.

Now, the present claimants, the *Public Works Construction Company*, say that they have a right to be paid part of that money, because the *Railway Company* or the *Navigation Company* made a contract with them to do certain works on the railway, which works, if they had been done, would have given them a right to have a part of that money which was deposited. The claimants however came to the view that the contract had been imposed upon them by misrepresentation, and that they had a right to rescind it, and thereupon they did rescind it; and if their representation be true that they were induced to enter into the contract by misrepresentation they would be entitled in some form or another to a remedy against the person who misled them

—that is, against the *Navigation Company*, or the *Railway Company*, or the person who made the fraudulent representation. But they say that as the persons who made that representation to them had deposited this money in the hands of the trustees, to be paid to the claimants if they performed the work under the contract, inasmuch as they were induced to enter into the contract by fraud, a Court of Equity will give them a lien upon the fund as deposited. In support of that proposition certain cases were cited. Now it appears to me that even if that money had been deposited by the *Navigation Company* or the *Railway Company* in the hands of trustees to be paid to the present claimants for work done, those cases are no authority at all for saying if the claimants rescinded the contract the Court of Chancery would have given a lien upon the fund. Those authorities are only applicable to cases as to the purchase and sale of land, and are not applicable in the way contended for. But the fact is, that neither the *Navigation Company* nor the *Railway Company* ever did deposit this money in the hands of trustees for the purposes supposed. Mr. *Romer* says, "*quâ* me, they did." Now it seems to me a strange proposition to say, *quâ* me, they did, when, *quâ* the people to whom the money belongs, they did not. They never were entitled, and never have been entitled, to the money as against the persons to whom the money really belonged, and I can see no principle upon which these present claimants can obtain this money from the hands of the bondholders, unless it be the principle of highway robbery, which is not one on which this Court has power to act.

COTTON, L.J.:—

The only point we have to consider now—and it is convenient to dispose of it at once—is, whether or no the *Public Works Construction Company* can make a claim, assuming that the Plaintiffs, as against the other Defendants, are entitled to the fund. Now, they rely upon a contract entered into just before the loan was issued; and Mr. *Romer* especially relies on the 13th clause of that contract, as giving him either a charge on the fund, or as making it a trust fund set apart. Of course one must look to see what the terms of the stipulations are; and there is a stipulation (I put aside the £50,000 paid) that, out of this sum so set apart,

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or to be set apart, in the hands of the trustees, the payments should be made in a particular way, as the work was from time to time done, on the certificate of the engineer being given that such work had been done. That, Mr. *Romer* says, constitutes him a party who is either to be considered as a *cestui que trust* interested in the fund, or as having a lien or charge on the fund to the amount of the sums as and when they became due. A certain payment was made to him under that clause; but, before he was in a position to ask for any further payment, he repudiated the contract; and he must be treated, in considering this question, as if he was rightly entitled, in consequence of representations made to him at the time when he entered into the contract, to be relieved from it; and to say, "I am not bound by this contract and I must be relieved from it, just as if there were no contract at all, because I was induced to enter into this contract by misrepresentation." That being so, he cannot, by any possibility, claim anything under clause 13, because the provisions of it have not had effect. There have been no certificates made on which he could demand payment. But he says, "Rightly repudiating the contract, I am entitled to a lien on the fund for any expenditure which I have incurred in order to carry out the contract and to obtain these payments"—that is, in other words, for the damages which he could recover against the persons by whose misrepresentation he was induced to enter into the contract. Though he puts it in a different way, it is simply a claim for the sum which forms one of the items in the measure of damages which he would be entitled to recover as against the person who induced him to enter into the contract. Is there any principle in equity which would entitle him to claim that? The only cases to which Mr. *Romer* referred are cases of the purchase and sale of land, and those, I think, are attributed by Lord *Hatherley* in *Middleton* v. *Magnay* (1) to the right principle, namely, that there is an implied contract in every case between the vendor and the purchaser that the purchaser shall have a lien on the property to the extent of the purchase-money he has paid. But, in my opinion, that principle will not apply to, and cannot be extended to, such a case as this, where the claim is not to have a lien on any such implied

(1) 2 H. & M. 233.

contract, but to have upon the fund appropriated to provide for the payments to be made on due performance of the contract a lien of a different kind, namely, a lien for the damages or part of the damages which one of the contracting parties may be entitled to as against the other if he repudiates the contract. In my opinion that principle ought not to be extended to such a case. No case has been quoted to support it, and in my opinion, on principle, that claim cannot be supported. I agree with what has been said by Lord Justice *James*, that, even if that was not so, yet having regard to the terms of the compromise, the *Public Works Construction Company* have agreed that their payments shall be made to them, not by enforcing any such lien as this, but that there should be paid to them a certain sum out of such payments as might from time to time be properly payable under a contract entered into by a certain other person. This other person never put himself in a position to require any payments, and, therefore, what they stipulated for by that agreement of compromise never could possibly arise.

Macnaghten, and *Snagge*, for the trustees.

Sir *H. S. Giffard*, in reply.

JAMES, L.J. :—

We will not keep the parties in suspense as to our judgment in this matter, in which it is our misfortune to differ from the learned Judge who decided the case in the first instance.

Colonel *Church*, in the year 1868, or thereabouts, was reasonably satisfied that it would be a very good thing for the State of *Bolivia* if instead of having access to the world only by means of the *Pacific*, on which it has a small strip of coast, it were able to obtain access to the world—especially to the Eastern world—through the *Amazon*, and the affluents of the *Amazon*, one of which runs for a considerable extent through the territory of *Bolivia*, and it was suggested by him to the Bolivian Government that if the falls upon the River *Madeira*, of which there are a considerable number, could be got rid of, there would be the means of making a complete navigation extending from the interior of

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Bolivia, down the *Amazon*, and so into the *Atlantic Ocean*, which navigation, if coupled with internal roads to the great centres of communication, would open up all that part of *Bolivia* which lies eastward of the great chain of the *Andes*, which is, in fact, the greatest part of the State of *Bolivia*. That scheme was probably a feasible one, and it immediately took with the Bolivian Government. Then Colonel *Church* entered into an agreement with the Bolivian Government that he would form a company with a nominal capital of $1,000,000 in gold. The Bolivian Government said in substance, "If you form a company of that kind we will give, not to you, Mr. *Church*, but to that company, rights of a very extensive character over Bolivian waters and in and over Bolivian soil." This is what is called the Bolivian concession. The original intention of the Bolivian Government was that this communication should be perfected by means of canals around the rapids. But it was suggested, and the suggestion was thought to be a good one, that instead of canalising around the rapids a railway should be made there. Colonel *Church* went to the *United States of America*, and there obtained an Act of Congress incorporating himself and some other gentlemen and such other persons as should be associated with them into a company, and on the paper on which the Act of Congress was written it was said that that company was to be a company with a capital of $1,000,000 in gold with power to increase it. What was done upon that was this. The moment the company was formed with a capital of $2,500,000 Mr. *Church* took upon himself to sell the Government's concession (the company's own concession) to the company for four-fifths of the whole capital in paid-up shares, leaving one-fifth, $500,000, to be free. The $2,000,000 which Colonel *Church* thus received in paid-up shares was immediately divided between himself and the other gentlemen, his fellow-corporators, who, by the Act of Congress, were with him the first directors. Out of the remaining $500,000, $50,000 were given to a broker as his commission, and $430,000 were sold, or somehow or another were parted with, to a Mr. *Irwin Davis* for the sum of £12,500 to meet, of course, the pressing engagements of the company. With that exception, not a farthing has ever been subscribed, not a farthing has ever been paid, and the company has

not a single person now upon whom it is entitled, according to its constitution, to call for one single farthing. This being the state of that company, the *Navigation Company* were represented to the Bolivian Government and legislature as being the company which was to do all the great works contemplated by the concession. Mr. *Church* besides, when he made up his mind, and apparently with the assent of the Bolivian authorities, to substitute a railway, found it necessary to get the power to make that railway which had to be made on Brazilian, not on Bolivian soil. Accordingly he obtained a concession from the Brazilian Government—that is to say, he was authorized by the Brazilian Government to form a company, and the Brazilian Government conceded, not to him, but to the company which he should so form, the right of making a railway on Brazilian soil, and a great number of powers and privileges usual, I suppose, in concessions of that kind. Having got this concession to the company, he formed another company, or at least another company was formed, called the *Madeira and Mamoré Railway Company*. That was formed, of all places in the world, in the City of *London*, under the *Joint Stock Companies Act*, and incorporated under that Act as a limited company, and that limited company had a very large nominal capital, of which we find that there were only 131 shares subscribed for upon which, until very recently, not a farthing was paid. To that company again Mr. *Church* sells its own concession for £20,000. Then that company being so formed, a bargain is made between the *Navigation Company* with the capital which I have mentioned, and the *Madeira and Mamoré Company* with the capital which I have mentioned, by which, in truth, every share of the company was sold to the *Navigation Company ;* the *Navigation Company* undertaking to do whatever was required to be done or had to be done by the *Railway Company*. These two companies having been so got up, it appeared to Colonel *Church*, and apparently also to some persons connected with the Bolivian Government, that it would be a very good thing to get a loan from the European public, especially from the English public, and accordingly bases of a loan were submitted by him to the Bolivian authorities, which bases of loan were approved of by the Bolivian Legislature, and resulted in an agreement, ultimately approved of by the Bolivian Legislature, by

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which a loan was to be raised in *Europe*, and out of the proceeds of that loan 83 per cent. was to be given to the *Navigation Company* for the purposes mentioned in the Act of the Bolivian Legislature, that is to say, for the works, improvements, &c., that were required to be made. I refer to that because it was argued before us, and it was said that one of the learned Judges had expressed his opinion that this 83 per cent. of the money to be raised became, by means of the transactions that took place between the *Navigation Company* and the Bolivian Government, the property of the *Navigation Company*, in this sense, that they were entitled to receive it immediately and do what they liked with it as money paid in advance for works, and that the Bolivian authorities were to part with the money and to look to the responsibility of the *Navigation Company* for the performance of the works. Whatever may be said as to certain parts of the case, I do not think that any such fraud as that was intended to be practised upon the Bolivian Government. The 83 per cent. was to be given to the *Navigation Company* for the purposes of the concession, and was to be applied by them for the purposes of the concession, and was to be so applied for the purposes of the concession under the supervision and control of a commission, which was to be formed as specially mentioned in the Bolivian Act; that is to say, the money was to be deposited with them, but only as trustees; it was only their money in the sense that money is the money of any person to whom it is given for the purposes of being laid out in specified works, and they could no more, according to my view, have honestly applied a farthing of that money to their own purposes, or even have borrowed it or anticipated it for their own purposes, than they could have taken anybody else's money. The money ought to have been, according to the terms of the arrangement sanctioned by the Bolivian Legislature, kept as money specially secured, so to speak, under the control of the commission, and to be exclusively applied to the purposes for which that 83 per cent. was to be given to them. Therefore it really appears to me it is idle to say that that was in any sense their money, except as money in the hands of any public authority is for the specified purposes the money of that authority. I do not know that much turns upon it, but I thought

it right to say that that appears to me to be the position of affairs with regard to that 83 per cent.

Then when Mr. *Church* comes to *Europe* as representing the Government of *Bolivia* and the *Navigation Company* and the *Railway Company*, he, with the assistance of Messrs. *Erlanger*, brings out that loan. That loan was brought out by Messrs. *Erlanger*, acting for all three parties, who had up to this time been interested in the matter. A prospectus is issued to the public, and that prospectus is in truth the document, the bargain, the contract, upon which the bondholders parted with their money. That prospectus stated the object of the whole loan to be for the purpose of opening communication between the Republic and the *Atlantic Ocean*. "The principal object of the loan is to subsidise the *National Bolivian Navigation Company* formed under concession from *Bolivia* for the purpose of opening up communication between the Republic and the *Atlantic Ocean*." That is followed by the last paragraph in the memorandum which is added to the prospectus: "In conclusion, it should not be overlooked that the present loan is raised for an important international object, the realization of which is certain to be of the greatest advantage to the commercial world." Then, as part of the scheme, it was stated in the prospectus that the "new route would be established by means of steamers, and a railway about 150 miles in length around the rapids of the *Madeira* River, for which the Imperial Brazilian Government had granted a concession for fifty years to the *Madeira and Mamoré Railway Company*, of which the *Navigation Company* is practically the exclusive proprietor." Then it is stated that the *Public Works Construction Company*, who have had the line examined, have entered into a contract for the construction of the railway, and the same is to be completed and equipped within two years. In order to secure to the bondholders that the railway should at all events be made, it was specially stipulated that the trustees for the bondholders "will retain out of the proceeds of the loan as received a sum equal to the contract price of the railway, and temporarily invest and apply the same from time to time in payment of the works as they proceed," and, to that extent, according to my view, the money of the bondholders never left their hands at all. The moneys were paid into

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the hands of the trustees of the bondholders, to be retained by them for the purpose of applying the same for the payment of the works as they proceeded. The fact that that railway was to be made within two years was considered, as it appears, so much of the essence of what was then offered to the bondholders that provision was made for the payment of interest, and of the sinking fund during those two years, so as to cover the period fixed for the completion of the railway and works. The sum so received was £600,000. In addition to that it was mentioned in the prospectus that "the loan is guaranteed by the general revenues of the Republic and by a first charge on the entire customs dues collected on imports into *Bolivia viâ* the *Amazon* River. The Government engages to make arrangements for the receipt and remittance of the customs dues to the satisfaction of the bondholders and not to reduce these customs dues in any manner which may impair their security. As a further security for the loan the *National Bolivian Navigation Company* has executed a deed granting to trustees for the bondholders a first charge over its net revenue from every source, and containing full powers for the inspection of books and accounts, and in case of profits being withheld, for entering at once as receivers into possession of all property and assets." A contract for a lump sum was made, as stated there, with the *Public Works Construction Company* for £600,000 to complete the railway, with all the appliances necessary for equipping it, but for some reason or another, that company, after having begun to do something towards making the line, said they had been deceived and induced by false representations to enter into that contract. The bondholders had nothing to do with that, but the result was that the line was not made by the *Construction Company*, and the two years during which it was to be made so as to produce an income passed by. Litigation ensued between the *Public Works Company* and the *Navigation Company*. The *Public Works Company* claimed damages for the misrepresentations that had been made to them. On the other hand, the *Railway Company* and the *Navigation Company* brought a claim against the *Public Works Company* for the return of the £50,000 which they had paid them down in advance, and for heavy damages which they said they had sustained by reason of the breach of contract by the *Public Works*

Company. That litigation was compromised by the parties to it without any interference on the part of the Bolivian Government or of the bondholders, and £45,000 was to be provided as compensation to the *Public Works Construction Company* in a manner which it is not necessary for me to deal with; though it was to be provided for out of the proceeds that would be payable upon the further construction of the line. That contract having come to an end in that way, another contract was made with two gentlemen of the name of *Dorsey* and *Caldwell*, under which nothing was done, and another contract was afterwards made with gentlemen of the name of *Reed*. Messrs. *Reed* not having gone on with the work to the satisfaction of the companies, the companies took upon themselves to determine that contract. Messrs. *Reed* thereupon filed their bill against the companies for damages for unlawful determination of that contract. They succeeded in that suit against the companies, and obtained a decree declaring them entitled to damages of which an account was to be taken in Chambers, but, as we are told by the solicitor, it ended in a compromise, under which a certain sum of money is to be found somehow or other for the payment of those damages. After all that, we come to the contract which was made with Messrs. *Collins*, one of whom we have had before us as a witness, which contract was made on the 25th of October, 1877. Now the railway ought, according to the prospectus, to have been made within two years from the 20th of January, 1872, and then in October, 1877, a contract was purported to be made with two gentlemen of the name of *Collins*, under which one of the things to be done was, "To make such surveys of the ground as may enable the company's resident engineer hereafter mentioned to determine, subject as hereinafter in this article mentioned, the definite course of the railway." That is to say, that up to the 25th of October, 1877, even the definitive course of the railway had not been ascertained. Then, when we come to look at what that contract was, we see that the contract was no contract to make and build the railway, in the ordinary sense of the words. The contractors had power to determine it, if they did not receive the payments: that is to say, it was a contract, in truth, to do the works of the railroad, so far and so long as they should receive

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cash from time to time, either out of the fund, the subject-matter of this suit, or out of debentures to be provided for with a guarantee. Article 47 I will read. "If the contractors shall be unable to obtain all or any of the cash payments out of the trust fund to which they shall become entitled under this contract as and when the same payments shall respectively become payable, or if the *Railway Company* (after the guarantee of the Imperial Government mentioned in Art. 28 shall have been given) shall commit default in making all or any of the debenture payments to which the contractors shall in like manner become entitled as the same shall respectively become payable, or if default be made in the performance of any other of the covenants of the contract to be by the *Railway Company* and the *Navigation Company* kept and performed, the contractors shall have the right to suspend the works, and if such default in payment shall continue for the space of four months the contractors shall have the right, if they shall think fit, to put an end to this contract without prejudice to any claim which they may have against the *Railway Company* or the *Navigation Company* under the same for such default or otherwise." That is to say, so long as they were kept in cash, and so long as they received debentures, they were to go on with the construction of the railway; but they were not even to do it at so much a mile, but, as Mr. *Collins* very frankly stated, they were to do earth work at so much, rock and shale work at so much, ballasting at so much, masonry and culverts at so much, bridges at so much, wrought-iron piles for bridges at so much, and so on. The contract, moreover, contained this clause: "Delivery of the railway to the *Railway Company* shall not be given unless and until the contractors shall have received payment in cash or debentures in accordance with this contract of all the sums they shall be entitled thereunder to receive, and if such payment shall not be made at or before the completion of the railway the delivery of the railway shall be postponed, and in the first place shall be given to a manager and receiver of the railway to be appointed by the contractors with the necessary subordinates to work the same, who shall hold and work the railway for and on behalf of the contractors with the necessary subordinates to work the same, who shall hold and work the railway for and on behalf of the con-

tractors and otherwise act in relation to the railway as if the contractors were mortgagees thereof in possession until the amount due to them is paid in cash or debentures in accordance with this contract, it being agreed that the contractors should have a lien upon the railway until they shall have been so paid but no longer." That stipulation is in direct violation of the rights of the bondholders. The bondholders were to have upon the railway a prior right. They were to have a charge upon the whole of the profits, from every source, arising from the undertaking, subject only to the expenses of the working. It was argued, indeed, that the net profits in that case meant the net profits, not after what were called working expenses, but net profits after paying any sums of money that might be expended in making the railroad, if the money in the hands of the trustees was not sufficient for the purpose. I am not able to follow that argument, for it is clear, both from the prospectus and the deed referred to in the prospectus, that the net profits were to be in fact the income out of which interest is paid and out of which shareholders are paid. That contract was therefore one under which, beyond all question, the trustees of the bondholders would not be justified in making any payments, for such payments would be a direct breach of the trust towards their *cestuis que trust*, the bondholders. That contract, as long as it exists, renders it utterly impossible that a valid contract can be made, and here we are in the month of May, 1879, with no contract, with nothing ever really done, and with nothing that can be done until some new contract is made for the construction of the railway, and then it will require some years after that contract is made in order to do the work. In that state of things the bondholders, with the consent of the Bolivian Government, say, "There is a time for everything. Now give us back our money; the railway has not been made, there is nobody to make it, there is no proper or legal contract for making it: give us back our money." The Bolivian Government, who borrowed the money, and who are primarily liable for it, are willing that it should go back to the bondholders. The bondholders, or at least the majority of the bondholders, are desirous of having the money back, and this action is brought for the purpose of having the money so returned to them. This is objected to by the *Navigation Company* and the

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Railway Company, and is objected to by a certain person, who says he is a bondholder, and who takes a different view of the case. Now, with regard to the *Navigation Company* and the *Railway Company*, I cannot conceive it possible that two such shams and fictions as these companies are and have been from the first, fictions and shams created and existing for the sole purpose, it seems to me, of deluding a credulous public into subscribing to a loan which was brought out by them and the Bolivian Government, can be heard in a Court of Justice to make any claim in respect of the moneys which they were instruments of obtaining, in the mode which I have mentioned, from the bondholders. It appears to me that the atmosphere of the temple of Justice is polluted by the presence of such things as these companies; but if I were dealing with the case merely upon that ground, probably I might have occasion to consider more minutely than I have done, whether there is in the former proceedings anything in the nature of a *res judicata* which would prevent the bondholders from drawing the attention of the Court to the character of the companies, and to their real position.

I pass now to consider the case as it stands between the two classes of bondholders—the bondholders who say that they want their money back and the bondholder who says that he does not want his money back; or, at least, the person who does not want the money to be diverted from the purposes to which he says it ought to be applied. Now, in the first place, each of the bondholders has only his own individual right to the bonds which he has, and the bondholders have not formed themselves into any association or body of persons in which by any law the majority has the right to bind the minority. To that extent I agree with what was said by Mr. Justice *Fry*, the majority have no right to say to the minority, "We will determine for you." Each of them having paid his proportion of the money contributed by the whole body of the bondholders, the £600,000 in question, with the accrued interest, was a common fund appropriated for the purpose of making that railway. The Plaintiffs then say to the dissentient bondholders, "It is very true that against your consent we could not withdraw that money from the purpose to which it was appropriated by our unanimous assent, but we say that it was

appropriated for a purpose which has become abortive, and which can no longer be carried into effect according to the true intent and meaning of the bargain between us." The purpose for which it was to be applied was the construction, completion, and equipment of the railway, and unless it is and can be so applied it must not be thrown away in making a fraction of the railway which will simply end in an impenetrable forest, a few miles from the terminus at *San Antonio,* where it will be of no earthly utility to any human being, and will produce no revenue either to the bondholders or to anybody else. They say it has become impracticable, that is, to use the expression which has more than once been used, "in a business sense" the thing has become impracticable. Now, how do the Plaintiffs shew that? The contract which has been produced, and which is the best contract that has hitherto been obtained, and the best contract that there is any possibility of obtaining, is one by which the cost, independently of equipment, and rolling stock, and so on, would be £1,200,000 instead of the original £600,000. Now what are the funds out of which this sum can be paid? There is the fund in the *Bank of England.* No doubt Messrs. *Collins,* or any other contractor, would be very glad to do the railway works to the extent of that fund in the *Bank of England;* but when that fund in the hands of the trustees is exhausted, what is there to which anybody can look for the purpose of making the railway. It is suggested, first of all, there is the property of the *Navigation Company.* We know what that is. There is the property of the *Railway Company.* We know what that is. We shall get £400,000 from the Brazilian Government. Now that, in truth, is the only fund as to which there is any shadow or pretence for saying that there is any possibility of its being forthcoming. But it is quite clear to my mind that not a farthing of that will be forthcoming, or can be in any sense which would be consistent with the rights of the bondholders. And on this part of the case it may not be wholly superfluous to observe that no contract can be honestly entered into without proper legal and engineering advice and assistance, nor one which does not provide for a resident engineer and staff, and for a principal engineer. Now the company has not a shilling to pay engineer, lawyer, or secretary, or for any other advice or assist-

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ance. Indeed, it must be absolutely dependent on the eleemosynary assistance of individuals (who have some private inducement to be bountiful) for a room to meet in, and for pens, ink, and paper. It has not a penny to pay for a postage-stamp or a letter, unless, indeed, it levies backshesh or *pots de vin* from the new contractors, *e.g.*, selling worthless shares at par price. Nor would the company as company, if it were a real and substantial one, have the remotest interest in spending the bondholders' money. If the whole scheme were realized, is any person so credulous as to believe that it would ever pay the interest accumulated and accumulating, and then the capital sum of £1,700,000, the first charge on the property? The motives and interests of the individuals acting in the name of the company are of course very different and easy to be imagined. It would be very strange indeed if persons having to expend £800,000 to make the contracts and supervise the works did not find some of the money adhering to their hands. In this state of things, as it seems to me, the case is at an end. The railway cannot, in my judgment, practically be made. There are no funds forthcoming out of which it can be made; and, if we were to allow this money to leave the hands of the trustees, it would be utterly wasted in making part of a railway which would be a wreck on the surface of *Brazil*, and of no utility whatever. I also agree with what has been said that the railway is only a part of the scheme. The object of the bondholders, for which they subscribed their quotas to the common fund was to have a new route established by means of steamers and a railway so as to make a communication between *Bolivia* and the world, through the rivers, by which, when made, they would get, as security for their money, the profits and the customs pledged by the Bolivian Government. Unless, then, that is completed as well as the railway, the whole thing is a failure as far as the bondholders are concerned, and with regard to that source of revenue, which was the main source of revenue—the principal thing—the fund specially hypothecated for the loan—that depends entirely upon the Bolivian concession. Now it has been proved to us that the Bolivian concession has been revoked by an act of the Bolivian Government. Mr. Justice *Fry* treated it as a wrongful act of a sovereign power, and as a wrongful act of which

a government suitor in this Court could not avail itself. I am bound, however, to say, that if it were necessary to consider as to the act being wrongful or illegal (though illegal is a term not applicable to it), the view I take of the case is, that I never knew a more righteous or rightful act in the world than that by which the Bolivian Government (when they ascertained the nature of the companies which had been palmed off upon them as the companies to do this work, and when they discovered the utter failure of these companies to do anything) determined the concession, and revoked that which had been obtained from them by what I cannot otherwise describe than as false pretences. It has been arranged that the suit shall be treated as a bondholders' suit, and not as a Bolivian Government suit. The bondholders, at all events, are entitled to say that the Bolivian Government has revoked the concession. Even if that revocation were wrongful, there are no means whatever by which we can compel the Bolivian Government to restore that concession. Therefore the bondholders say the scheme has failed as far as we are concerned. Any one bondholder, on behalf of himself and of the others, has a right to say that the scheme has failed, and that any other bondholders who take a different view have no right to have the money absolutely thrown away. It seems to me that, even if there were an honest *bonâ fide* difference of opinion among the bondholders, merely as bondholders, and having regard to their interest as such, the Court could not listen to the voice of the minority against the majority of the bondholders. One bondholder has made himself a party who says, "I am a bondholder because I happen to have a bond in my hand which has been given to me by somebody so that I may say that I am a bondholder and I am here as a bondholder in the suit." He is the only person, however, and no evidence has been tendered to shew that any one bondholder, in the character of a bondholder, entertains any opinion that any profit or benefit could ever accrue to him from having the money now lodged in the name of the trustees applied towards the construction of the railway. Of course, we can see that there may be many bondholders who may wish to have the money so applied. Of course anybody who may have, from any motive, a wish that this money should be thrown away so as to produce

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profit to the contractors and others who are doing the work, and who can buy a bond, can give himself the rights of a bondholder. But, even assuming that there was an honest minority of bondholders taking a different view, the majority, or any bondholder, has a right to say, under the circumstances I have mentioned, that this scheme has failed, and that the money ought to be returned. For these reasons I am of opinion that the decree of the learned Judge must be reversed, and that there must be a decree in substance giving the money back to the bondholders.

I have not gone into the former decrees, because none of the former decrees, as it appears to me, amount to a *res judicata* upon any one of the points upon which I have thought it necessary to base my judgment; and it is not necessary to consider all the expressions contained in those judgments, or whether anything I am saying now is in any way inconsistent with any expression to be found in any one of the judgments pronounced in these suits. This suit is presented by different parties; it is of a different character, and the allegations are different, and there is a totally different set of circumstances from those in the suits which were tried before, and there is nothing, I may say, which amounts to a *res judicata* upon any part of the case. Of course, in the view that I take of the matter, nothing is based upon the agreement between the Bolivian Government and the committee of bondholders. The committee of the bondholders and the Bolivian Government could not by any such agreement as that give to the bondholders any right which did not exist before. A decree must be made directing a division of the fund among the bondholders, rateably according to the amounts due to them; but, of course, that decree will be without prejudice to any rights of the Bolivian Government as between them and the bondholders who have assented to the arrangement.

BRETT, L.J.:—

This case has taken a very long time to argue, but I confess it seems to me that the principle of law which is applicable to it is very plain, and that the results of the evidence are also extremely clear. The subject-matter of this controversy is a sum of money, originally £600,000, in the *Bank of England*, in the names of

trustees, and it seems to me that the *status* of that fund and the relation to it of the Plaintiffs and Defendants are to be determined by the proper construction of the prospectus, and upon a true construction of that prospectus it seems to me that the case may be properly thus stated, that the bondholders have agreed, first with the Bolivian Government to lend a sum of £600,000, not absolutely, but to be expended for a certain definite purpose, which purpose, when effected, would be both for the benefit of the Bolivian Government, the borrowers, and of the bondholders, the lenders. But also by that prospectus that purpose was, with the consent of the bondholders, to be carried out by the *Navigation Company* and the *Railway Company*, so that the position may now be stated thus: that the bondholders have agreed to lend £600,000 for the effecting of a purpose by the *Navigation Company* and the *Railway Company*, which purpose, when effected, would be both for the benefit of the Bolivian Government, or, if you please, of the *Navigation Company*, and the *Railway Company*, and the bondholders. The purpose was the opening out of a communication from a great part of *Bolivia* and a great part of *Brazil* with the *Atlantic Ocean*, by means of the *Amazon* River and a railway for the carriage of goods, and if that purpose were effected, it would be for the benefit certainly of *Bolivia* and *Brazil*, but it would be for the benefit of the bondholders also, because, by the arrangement, that scheme was to be pledged to them as a means of repaying them the money which they had advanced, and the interest on their bonds in the meantime.

Now, where the money is to be loaned upon such an understanding as that, it seems to me that if the scheme wholly fails, the most ordinary principles of law determine that the money must be given back to the bondholders. The money has never been paid to the Bolivian Government, or to the *Navigation Company*, or to the *Railway Company*. The money is in the hands of trustees, and of trustees for the bondholders. The bondholders have found the money, but it has never gone effectively from them to the borrowers. It has stopped *in medio* in the hands of trustees; but the principle of law seems to me to be identical with what it would be if the money were paid to the borrowers for a consideration which is to be accomplished after the payment of

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the money, and by the most ordinary principle of law, where money is paid for a consideration which is to be performed after the payment, if that consideration wholly fails, the money becomes money in the hands of the borrowers held to the use and for the benefit of the lenders, and must be returned. That would be the case at Common Law under such circumstances. But here you do not want to carry it so far, because, the money being *in medio,* if the consideration for which the money was to be handed over fails, the money must be given back by these trustees to the bondholders. That seems to me a plain principle of law, and no decision in any of the suits which have hitherto taken place between these parties has determined anything to the contrary. Therefore there is no estoppel by any former judgment; on the contrary, the judgment of the Master of the Rolls on the demurrer is precisely in favour of that view. It is quite clear that that judgment would not be binding upon us if we differed from it; but, so far from differing from it, it appears to me that upon the plainest principles that decision was right. Therefore, the question here between the parties must be whether the scheme has wholly failed, that is to say, has become in any ordinary and business sense wholly impracticable. Now it is said that, even though it has become impracticable, yet the money must not be paid back to the bondholders who require to have it paid back, because some of the bondholders do not wish to have it paid back. I confess that to me seems to be an astounding idea. It is said that there is a bondholder here who objects to have the money paid back, although the consideration and purpose, as I say, have wholly failed. Now we have heard of pretenders in this suit. I must say that the only person who seems to me to be absolutely a pretender in this suit is this ideal bondholder who is objecting. I confess, if I had to rule upon that as a matter of fact, I should say that that ideal bondholder is in reality the *Navigation Company:* but it is not necessary to consider that, because it seems to me impossible to say that if the object has entirely failed, the majority of the bondholders are to be prevented from getting back their money because other bondholders wish the money to be held. So far from saying that by that means you prevent the majority from binding the minority, you would, if that were true, enable the minority to bind the

majority to an absurdity. I quite agree that no agreement between the bondholders and the Bolivian Government could have affected the rights of the *Railway Company* and the *Navigation Company* if the scheme was capable of being carried out. It follows from this, therefore, that the real question in this suit, and the one which must determine it, is whether the scheme, which was, when carried out, to be for the benefit of the bondholders, as well as for the benefit of the Bolivian Government and others, has become impracticable in a business sense.

Now, my Lord has expressed his view with regard to parts of this transaction, and has expressed himself, as might be expected, in terms which, having that view, he was bound to use. I must confess to such an abhorrence of fraud in business that I am always most unwilling to come to a conclusion that a fraud has been committed, and I have very strong views with regard to what is the legal definition of fraud. It seems to me that no recklessness of speculation, however great, and that no extortion, however enormous, is fraud. It seems to me that no man ought to be found guilty of fraud unless you can say he had a fraudulent mind and an intention to deceive. Now, speaking for myself, I cannot decide this case upon any ground of fraud. It seems to me that Colonel *Church* was a person in a peculiar position—in a position which would almost necessarily lead him to reckless speculation. But reckless speculation is not fraud. I am not satisfied that there has been fraud in any part of this transaction; and, so far as I am individually concerned, I must absolve Colonel *Church* from any charge of fraud, though I think that he cannot be relieved from charges of recklessness and extortionate requirements. Now, with regard to the question whether this scheme has become impracticable. Mr. Justice *Fry* did what has been called nonsuiting the Plaintiff. Now, nonsuit is a technical term, and I do not think that when the case is tried before a single Judge, who is judge both of law and fact, it is necessary or right to say that he nonsuited the Plaintiff. If, after hearing the evidence adduced on behalf of the Plaintiff, he comes to the conclusion that upon the evidence he must find against the Plaintiff, it is of no use for him to hear evidence from the Defendant. He cannot suppose that the Defendant's evidence as a rule will strengthen the Plaintiff's case, and

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he would have a right, therefore, as it seems to me, to decide against the Plaintiff, and unless we were prepared to say that, taking the evidence as it stood before him, we should not have decided it in the same way he did, his judgment ought to stand. But the question before him was whether the scheme had become impracticable. He had the evidence before him of the very great length of time which had elapsed without anything whatever being practically done. He had the history of the *Railway Company* and the *Navigation Company* before him; he had what the Bolivian Government had done; he had the proposed guarantee of the Brazilian Government, he had so much evidence before him tending, to my mind, to shew that the scheme was impracticable unless that evidence could be answered, that I cannot agree to the decision to which he came, and if the case had been presented to me with that evidence alone, I should have thought that, unless the Defendant could answer that evidence, it ought to have been held that the scheme had become impracticable. Therefore, I think he was wrong in stopping the case where he did. We, therefore, were bound, I think, to hear the evidence which was called by the Defendants, but, after having heard that evidence, I am still of opinion that the scheme had become impracticable. The persons to carry out the scheme as determined by this prospectus were, in the first place, the *Navigation Company* and the *Railway Company*. Let me say that, to my mind, the *Navigation Company* and the *Railway Company* are one. The *Railway Company* is, I will not say a fictitious company, but it was a company established by Colonel *Church* in order to fulfil a requisition. I cannot see any reality in that company. If there is any shareholder in the *Railway Company* at all, it seems to me that that shareholder is the *Navigation Company*. Therefore I say that the body which was to carry out this scheme so far as the bondholders were concerned was the *Navigation Company*. Now, could the *Navigation Company* have carried out the scheme by themselves? When we consider, as my Lord has pointed out, who constituted the *Navigation Company*, and that, though its capital was $2,500,000, 2,000,000 of that capital was at once given to Colonel *Church*, not for money, but for the concession which in all probability he had no right to sell and take money for; and when we

hear that another considerable part of it, namely, $50,000, was paid to somebody for commission for bringing out the company, and that £12,500 only was obtained for the remainder of that sum from a Mr. *Davis*, what can be said as to the power of that company to carry out such a scheme as this? That company, of itself, obviously had no power at all. It had no capital and it had no credit, because the moment it had assumed to borrow money, unless people were reckless, as many people are (but we have no right to assume such foolish recklessness), they must have inquired into the constitution of the company, and they must have found that it was a company which could not obtain any real credit. Therefore the *Navigation Company* of itself could not carry out the scheme. It did not pretend to carry out the scheme. It assumed to carry out the scheme by other means and by other parties. The first mode in which it undertook to carry out the scheme was by a contract with the *Construction Company*. The *Construction Company* did enter into a contract to make this railway, which is a substantial part of the scheme. But under what circumstances? It seems to me that Colonel *Church* was as reckless as a man could be, but that the *Construction Company* was equally reckless. They undertook to make a railway, it is said, upon surveys. Now, there never has been a survey. Speaking of the *Kellar* surveys as surveys for this purpose would be nonsense. They were surveys of a river and not of a line of railway. It is said that to make the railway will cost £1,200,000. To my mind it is not certain that it will not cost a great deal more, on account of the infirmity of the survey. Then the *Construction Company* entered into a contract. They afterwards cancelled that contract on the ground, as they said, that they had been deceived. Whether they had been so deceived as to enable them, in point of law, properly to put an end to the contract, I do not venture to determine, but they would not go on with it, and, therefore, so far as they are to be the means by which the *Navigation Company* was to effect the scheme, they are gone. They assumed to cancel the contract, and, as it seems to me, the *Navigation Company* accepted that cancellation, for they immediately handed over the execution of this railway to other parties. They made two contracts, both of which were dropped. Then, after this number of years, they

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made a contract with Messrs. *Collins*. Now, we have to consider whether Messrs. *Collins* could have carried out this scheme. Mr. *Collins* seemed to me to admit that his personal capital was of the smallest kind, and that the credit of his firm would not of itself enable him to raise the money to make this railway; he relied only upon the terms of his contract, which would enable him to get the fund now in dispute, and, as he said, upon the power of raising money to the extent of £400,000 more by means of a guarantee from the Brazilian Government. Now, with regard to his getting the fund in dispute, as has been pointed out, it seems to me that he could not get it under his contract, because it would have been a breach of contract on the part of the trustees to pay him the money according to the terms of that contract. If they did pay him the money according to the terms of his contract, the money would be paid away to him, and he would have had a right to keep it, and also a first charge upon the railway, and so deprive the bondholders of the very security upon which they were to allow their money to go out. Messrs. *Collins*, therefore, could not obtain this fund. That, of itself, as it seems to me, made the scheme wholly impracticable, because, having regard to the number of years which have elapsed, and the position of things at the present time, it seems to me a proper inference of fact that, if the *Collins* contract were done away with, no contractor would undertake to make this railway upon less severe terms than *Collins* by his contract undertook. But supposing that fund could be got at, then we have to see whether the £400,000 could be raised, and it appears to me that it could not. [His Lordship stated his reasons for this conclusion.] But then there is another reason, which is, that the scheme cannot be carried out for the benefit of the bondholders without the consent of the Bolivian Government. Now a great part of the security of the bondholders was the concession of the Bolivian Government, but the Bolivian Government have cancelled that concession. I entirely agree that the evidence is complete that they have cancelled it. It seems to me immaterial whether that was just or unjust. Supposing it to be unjust, we have no authority over the Bolivian Government, and we cannot force them to regrant the concession. It has gone, and it is no fault of the bondholders if the Bolivian

Government have done wrong. The bondholders are not to have their rights put an end to because the Bolivian Government are wrong. I agree, however, with my Lord, that, considering what the *Navigation Company* was, the condition upon which the Bolivian Government had agreed to grant the concession had never been complied with, and that, therefore, the Bolivian Government were right in cancelling the concession. Then, if the Bolivian Government have cancelled their concession, so great a part of the benefit which was to go to the bondholders is gone, that, even though the railway were made, it seems to me that the scheme has become impracticable. It seems to me that each of the objections, taken by itself establishes this fact. But, taking the accumulative effect of all, it seems to me most plain that the scheme has become, as a matter of business, wholly and absolutely impracticable, so that the bondholders never can get any part of that which was the object for which they were lending the money, and without which they were not bound to allow the money to go out of the hands of the trustees. I am, therefore, of opinion, that this scheme having become impracticable, this money ought to be handed back to the bondholders who desire to have it, and if there is a gentleman who does not desire to have his share, he may leave it where it is.

COTTON, L.J.:—

This was an action in which the Plaintiffs, when the appeal was brought, were a bondholder on behalf of himself and all other the bondholders (except those who were represented by the Defendant bondholder) and the Bolivian Government. I advert to this question of parties in the first instance for the purpose of stating whose rights I intend to consider in deciding this case. The Bolivian Government were joined as Plaintiffs in consequence of an arrangement which has been made between them and persons purporting to represent the bondholders or those who agreed with the committee of bondholders. Now I think it right to state my opinion that no majority of the bondholders could by that agreement bind any dissentient minority or any dissentient bondholder, because there was nothing in the contract between the bondholders when they subscribed their money which would give power to any committee of them, or to

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any majority of them, to bind or affect the interests of those who did not assent to any arrangement made by that majority, or by that committee. Therefore the agreement cannot in any way affect the interest of dissentient bondholders. The suit must be looked upon entirely as a suit by bondholders asserting their rights without any assistance from the Government, or from any agreement with the Government. As the Government of *Bolivia* assents to what the bondholders ask for, we are relieved from considering the question whether any opposition of the Government of *Bolivia* could in any way alter our judgment or affect the rights to which, in my opinion, as in the opinion of the rest of the Court, the bondholders are entitled. But though the concurrence of the Government of *Bolivia* does not, in my opinion, give, either as against dissentient bondholders or as against the two companies and the contractors, with whom we have to deal, any right which, without it, they would not have, the mere fact that the Government of *Bolivia* is joined as Plaintiff does not in any way prejudice any rights which the bondholders may have. I say this because both in the argument, and to some extent in the judgment in the Court below, there was an argument of this sort. "Here are two persons coming to get the money. I dispose of the claim of one of them, and, therefore, I dispose of the claim of both of them." I think that, under the *Judicature Act*, we have the right to direct that the Government of *Bolivia* shall be made a Defendant, and I think it would be better so to do, for the purpose of shewing that the decree in favour of the bondholders is in no way founded on any right assumed to be in the Government of *Bolivia*, to claim the fund as against the Defendants, but simply depends upon the right of the bondholders.

Let us consider, therefore, simply the rights of the bondholders, and I may pass over very shortly what took place before the issue of the prospectus. The scheme, no doubt, was a great scheme, and, so far as I see, one which, if there had been funds and other means for carrying it into effect, would probably have been productive of very great advantages to *Bolivia*, and have produced the revenue which would afford a security for the bondholders. Immediately before the prospectus was issued, the position of the *Navigation Company* was this: There was an arrangement that a loan should

be issued by Colonel *Church*, on behalf of the Government, and that 83 per cent. of the proceeds of the loan should be paid to the *Navigation Company* as their own money in one sense, but as money which they were bound, by their arrangements with the Government and by their constitution, to apply to the purposes for which they were formed, that is to say, for forming this railway and for promoting the navigation. The bondholders thus far would have had no rights whatever as against this fund. But then comes the prospectus, and it is necessary, for the purpose of deciding the rights of the parties, to consider by whom that prospectus was issued. It was issued, undoubtedly, by the Government, that is to say, by Colonel *Church*, as the agent of the Government, but it was also issued by the *Navigation Company*, because, under the contract between Colonel *Church* and the Government, in pursuance of which the loan was issued, the Government, in fact, lent to the *Navigation Company* or to Colonel *Church*, on behalf of the *Navigation Company*, the power of pledging the credit of the Government for the purpose of raising this loan, of which 83 per cent. was to go to the *Navigation Company* for the purpose of the work which they had undertaken. It is material to consider that for this reason: When the *Navigation Company*, through Colonel *Church*, issued that prospectus, and money was paid by the bondholders on the faith and footing of that prospectus, the *Navigation Company*, through Colonel *Church* and the Government, who received the money on the footing of that prospectus, bound themselves to the bondholders who paid down their money, to observe and perform that which the prospectus stated would be done, and which was the inducement to the bondholders to lend the money. The *Navigation Company* therefore cannot, as against any rights which the bondholders may acquire from the statement in the prospectus, urge that, independently and antecedently to that prospectus, they had the right to claim this 83 per cent. of the proceeds of the loan. They, having that right, bound themselves, as did the Government by the terms of the prospectus, to all persons who advanced and paid their money on the faith of the prospectus. It was said that the prospectus did not create any trust on behalf of the bondholders. I will shortly state its effect. It was to the effect that the money would be applied in part—the amount is not

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stated—for the purpose of completing a most important link in the opening of communication between the Republic of *Bolivia* and the *Atlantic Ocean*. Then it was provided that a certain proportion of the fund—not named—would be placed in the hands of trustees, and that that should be applied from time to time in payment for the works of the railway as they were made. In my opinion, when the fund was afterwards received on the footing of the prospectus, and placed in the hands of the persons therein named, they became trustees, not only for the contractors and the *Navigation Company*, but trustees for the persons who, on the faith of that prospectus and of that statement, had advanced and lent their money, part of which they were assured would not go to the persons borrowing it, but would be held *in medio* by trustees for the particular purpose, with the obligation and duty to apply it for that purpose, and for that purpose only.

Before I go further, let us see what has been decided by previous judgments and decrees. I first take the suit instituted by the *Navigation Company* after the *Construction Company* had repudiated the contract into which they had entered. In my opinion, that in no way prejudices the claim of the bondholders, or decides anything adverse to them, with one exception, possibly, which I will advert to when I deal with the bondholders' previous suit. In fact, what that decides was this: the *Navigation Company* said, "The trust created for the *Construction Company* having come to an end, the money ought no longer to remain in the hands of the trustees named in the prospectus, but ought to go to us," not, I think, that they might deal with it in any way they thought fit, but on the ground that they were incorporated for the purpose of effectuating this scheme as a whole, and ought to have the fund for the purpose of dealing with it in the best way they thought fit for the purpose of that scheme. As against that, the Master of the Rolls decided that the prospectus created rights in other parties besides the *Navigation Company* and the *Construction Company*, namely, in the bondholders. His decision, therefore, is an adverse decision to the *Navigation Company*, and a judgment to some extent in favour of the bondholders, because it recognises them, and establishes that they had acquired by means of the prospectus, and by the

fact of their money having been paid on the terms of the prospectus, a right to treat the fund as one to be held for their benefit in the hands of these trustees.

Then we come to the suit instituted by the Government of *Bolivia*, and the case made by it was this: The Government of *Bolivia* said: "We were induced to enter into this arrangement by means of misrepresentations made to us. Give us back the money free from any claim. Give it us as part of the money due to us by the bondholders." There was a decision against that, and that was all that was decided in that case. What the Master of Rolls said was: "No fraud upon you, the Government of *Bolivia*, if there was fraud, can enable you to withdraw this fund, because the bondholders have rights in it, and therefore you cannot, because you were defrauded and deceived by those with whom you were dealing, deprive the bondholders of the security on the faith of which they paid their money." That, again, is, as far as it goes, rather in favour of the bondholders than against them.

We then come to the bondholders' suit. That was the only one which has a semblance of prejudicing their case in the present suit. They seem to have considered that for some reason or other they could get back this fund in consequence of the failure of the contract with the *Construction Company*. That was decided against them. But they did not in that case raise the issue that the scheme on the faith of which they had advanced their money had become impracticable and never could be carried into effect. They went on other grounds. No doubt it was apparent in that case that the railway could not be constructed under the original contract with the *Construction Company*, and that it could not be constructed for the original £600,000, which was the amount of their contract. To that extent it is *res judicata* against the bondholders; and if here they relied on the fact that the original contract had failed, and that the £600,000 retained was not sufficient, and that on this ground they were entitled to have the money returned to them, that would be a decision against them, and they would be bound by it. But for that decision, as the prospectus states, not that £600,000 has been retained, but that the contract price of the railway has been retained, and would be applied in making the railway in two years, I think there

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would be a considerable question whether, when that contract had failed, and it had become apparent that the contract price of the railway (not £600,000) could not be retained out of 83 per cent., because it exceeded 83 per cent., they would not be entitled to say, "The security which we contracted for has become impracticable, and therefore the whole purpose for which we advanced and paid our money or put it into the hands of these persons is at an end and we are entitled to get it back." But that, I consider, cannot be entered into now, having regard to that decision, and it is not necessary, in my opinion, for the purpose of deciding this action. For the present action does raise distinctly this issue, "We advanced our money on the faith of the prospectus; the prospectus told us that there would be created a security for us out of the revenues and income, from which we should get not only payment of the interest but a sinking fund which would pay us the whole of our capital, and that that security was to be created in the most essential part of it by the employment of and putting into the hands of trustees a certain proportion of the money which we were advancing."

It appears to me that there are two issues of fact which we have to consider; first, whether, if we treat the railway by itself alone, it is practicable; secondly, if we look upon it only as a link in the scheme, whether, if that link can be made, the remainder of the scheme has not failed and become impracticable, so that the security on the faith of which the bondholders lent their money having become impracticable they are entitled to have their money back again?

First, taking the railway by itself, I do not rely very much upon the lapse of time; yet the fact cannot be disregarded that the several contracts which have been entered into previously to the present one have for some reason or other failed, and there seems to be either an unwillingness, or want of power, to make the railway. I do not mean that there is any engineering difficulty, but for the purpose of deciding whether the security can be created we must consider whether the work which is to make the security can, as a matter of business, be executed; that is to say, whether, by means of the funds in hand, or available, that can be done which will create the security. Having regard to the failure

of these several contracts, I think, with all respect for Mr. Justice *Fry*, that he was wrong in stopping the case on the opening without calling on the Defendants for any evidence, and in holding that the Plaintiffs had not made a *primâ facie* case, such as called for any reply. But we have now heard what evidence can be given, and therefore are in a much better position for forming our judgment on the questions of fact which arise.

It was said "there is an existing contract for this railway, and how can you say that it is impracticable?" The existing contract is open, as has been pointed out already, to a very obvious blot. It being admitted that the £800,000 in the hands of the trustees is not sufficient for the purpose of completing the railway, and it not being certain whether or no the Brazilian Government would guarantee debentures of the company, there was a provision that any balance beyond the £800,000 should be given to the contractors in the form of a charge or right of retaining the railway and obtaining payment out of the income from it. It was argued by Mr. *North* that that was not at variance with the rights of the bondholders, and the rights of the bondholders depend upon what is given in terms and at length in the contract between the *Navigation Company* and Messrs. *Erlanger*, because the contract between the *Railway Company* and Messrs. *Erlanger* refers to this and gives the same right. But what is by that contract pledged to the bondholders? It is the entire net profits of the company; "such net profits consisting of any sums of money received by the company from any sources of revenue to which it is now or may hereafter become entitled after the payments of the expenses and charges incurred in earning its revenues, but before deducting any sum whatever for the benefit of, or for division among, the shareholders of the company." These words say what the entire net profits mean, namely, the revenue after deducting what one may call shortly the working expenses, and this is what we should expect, for it was contemplated at the time that the whole expenses of making this railway would be provided for by the £600,000 of the loan which was to be deposited for the purpose of making the railway. The stipulation to which I have referred is therefore in derogation of the rights of the bondholders, which would prevent anything being paid by the trustees out of this fund for the

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purpose of this contract. That being so, that stipulation, independently of the other blots in the contract which were pointed out by Lord Justice *James*, is a fatal difficulty.

But I think we ought not only to consider whether that contract could be carried into effect. We ought to see whether or no, by any other means, it can be said that it is practically possible to make this railway. [His Lordship then entered into a consideration of the circumstances, shewing the uncertainty as to what the total cost of the line would be.] That being so, what funds are there for the purpose? The £600,000 or £800,000 it is conceded is not sufficient. It was said that the Brazilian guarantee would enable them to find funds. But when the Brazilian guarantee is looked at it is only a guarantee of 7 per cent. interest on £400,000 additional capital, and seems to amount to no more than this, that if £400,000 were made available for the purpose of being employed in the railway, and was so employed, then there was a guarantee of interest by the Government. That would not enable the contract with Messrs. *Collins* to be carried into effect, and even if debentures were issued and were guaranteed, which I can hardly suppose possible, the debentures would be as much exposed to the objection which I have pointed out in regard to the stipulation in Messrs. *Collins*' contract, that they should be paid by taking the revenues of the company, as that contract was; because debentures, of course, to be available to anybody or to satisfy the Government, would be debentures available by enabling those who are entitled to them, by means of a receiver or otherwise, to get the revenue of the company. Moreover, it appears from the evidence of Mr. *Collins* that it was necessary for the Messrs. *Collins* to have the means as the work goes on of raising the money necessary to pay for the works. Having regard to that, this Brazilian guarantee would not be available for the purpose of enabling them to go on with their work.

Another matter was mentioned, namely, the means and the credit of the *Navigation Company* and the *Railway Company*. I think it is unnecessary, having regard to what we have heard of these two companies, to go into the question as to whether their means or their credit would in any way put the contractors in funds for the purpose of supplementing the fund in the *Bank of*

England; and here I must say that, although I do not in any way impute any blame to Colonel *Church* as to the way in which this matter was originally brought forward, I cannot quite concur with the observations made by Lord Justice *Brett* as to his conduct with reference to these two companies. The concession given by the Bolivian Government was in no way a concession to him; it was a concession to the company to be formed. The Government said, if you organise a company, we will grant to that company certain rights and privileges, and yet Colonel *Church* took from the *Navigation Company* when formed $2,000,000 of their capital in payment for the concession, and when he had obtained from the Brazilian Government a concession for the railway, and the *Railway Company* was formed, he took from them £20,000 for selling to them the concession of the railway, and, as I understand, received that sum in some way or other out of the money raised from the bondholders on the prospectus.

[His Lordship then disposed of an argument that the lands comprised in the concession would enable the companies to raise the requisite funds.]

I think I have exhausted all the means which it is said would enable the *Navigation Company* or the *Railway Company* to construct this line, and in my opinion the conclusion at which we ought to arrive is this, that, even taking the railway alone, there are not funds in hand or funds available which will enable this railway, as a matter of business, to be made.

But the case does not stand there. The bondholders are entitled to say that the question is not simply one as to the construction of the railway, but as to the construction of it as a link in the communication between *Bolivia* and the *Atlantic* (for it was on the security of the sums expected to be raised by a duty on goods imported as well as on the revenue, not only of the railway but of the navigation, that they lent their money), and that, even if all the means now in hand were available to these companies to make and construct the railway there, and so enable them to put steamers on the upper portions of this river, there is nothing to enable them to open out roads from the interior so as to bring down to those rivers the goods which it was contemplated would be brought down and conveyed by the river.

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We then come to what has been already adverted to by the other Lords Justices, namely, the withdrawal of the concession by the Bolivian Government. In my opinion, we ought, as a matter of fact, to come to the conclusion that the Bolivian Government, so far as it can do so, has withdrawn the concession. It certainly has withdrawn its countenance from those who promoted this scheme and who now wish to retain the money for the purpose, as they say, of carrying it into effect. In my opinion, we are not here to consider, looking at this simply as a suit of the bondholders, whether or no the Bolivian Government had a right to put an end to that concession. I by no means say that they had not, and whether or no they had a legal right to do it, I think there can hardly be a question that they were fully justified, in the opinion of all reasonable men, in the course they took when they saw that the *Construction Company* had been unable to carry on the contract, and had withdrawn from it in consequence of misrepresentation on the part of those who issued the loan; when, also, they saw the enormous delay, and when they found what was the true position of these two companies, the *Navigation Company* and the *Railway Company*, which had been formed, one for the purpose of the general scheme, and the other for the especial purpose of the *Madeira* and the *Mamoré Railway*. That these circumstances were in the minds of those who advised the Bolivian Government, cannot, I think, be doubtful, because we find them complaining that those who had promoted the scheme had done nothing but organise imaginary companies, and that was, in my opinion, a true description of these companies. They might be companies legally constituted so as to have an existence, and comply in form with the requisitions of the Government, but they were nothing but imaginary companies, if you look upon a company as a body associated for the purpose of carrying an object into effect, and having means to enable it to do so, and not as a mere name for the purpose of its being carried into effect by other persons. I am, therefore, of opinion that the railway, whether taken by itself or as a part of the general scheme, has failed. That being so, as there is a trust for the bondholders, and the scheme to create the security on the faith of which they advanced their money has become as a matter of business impracticable,

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my opinion is that those of the bondholders who desire it are entitled to say, "This money is still *in medio*. Hand back to us that which we supplied on the faith of a security which cannot now be created and cannot exist." There are those no doubt who dissent, but their dissent cannot have a greater effect than the dissent of a partner to the dissolution of a partnership entered into for particular purposes of profit. In that case, if the purposes of the partnership cannot be carried into effect with any reasonable prospect of profit, the Court can and does dissolve the partnership. If we do not treat these persons as partners, but as persons who lent their money for a common object, when that common object cannot be carried into effect I am of opinion that those who desire it are entitled, as against the will of any number of dissentients, to say that the money must be returned. Those gentlemen who do not like to have it back may leave it where it is without taking advantage of the decree.

Solicitors: *Wilson, Bristows, & Carpmael; W. W. Wynne; G. M. Clements; Cunliffe, Beaumont, & Davenport; Norton, Rose, Norton, & Brewer.*

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Dec. 2, 4, 6, 7, 9.
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June 21, 23; *Nov.* 11.

[1878 W. 88.]

Patent—Insufficient Specification—Specification too general—Invention communicated from Abroad.

The specification of a patent is bad if one of the materials to be used is described by a generic term comprising a variety of species, the majority of which would be unsuitable.

The specification of a patent is bad if a skilled mechanic would not, without performing a series of experiments, be able to construct the machine from the description.

The specification of a machine for crushing meal described the rollers between which the meal was to be crushed as "to have a surface consisting of material containing so much silica as not to colour the meal or flour. I prefer to make them of iron coated with china, and finally turned with diamond tools;" and the claim was *inter alia* for the use of material "of the hardness required." It appeared that the rollers must be made of a very hard china, such as had scarcely been made in *Europe* during this century, and specially tough, and must be fixed in a peculiar manner to an iron

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core or spindle which carried them; and according to the evidence, a miller or a skilled mechanic would not, without making a series of experiments, discover of what china the rollers must be made or how they must be fixed to the spindle;—

Held (affirming the judgment of *Fry*, J.), that the specification was insufficient, and the patent invalid.

Per Fry, J.:—Though the grantee of a patent for an invention communicated to him by a foreigner resident abroad is only bound to tell the public all that he himself knows, yet, if the original inventor has not told him enough to enable him so to describe the invention as that it can be constructed by the aid only of the specification, the patent will be invalid.

Plimpton v. *Malcolmson* (1) explained.

THIS was an action to restrain the infringement of a patent dated the 6th of March, 1874, and granted to *T. N. Palmer* for "an improved machine or apparatus for treating or preparing meal" a communication from abroad by *Frederick Wegmann* of *Naples*.

In the specification filed on the 20th of August, 1874, a machine was described by which meal was to be passed from hoppers between wooden rollers, and then between a pair of rollers called "squeezing rolls," making 200 or 300 revolutions a minute, and having peculiar scrapers; and it was said, "The squeezing rolls are to have a surface consisting of material containing so much silica as not to colour the meal or flour. I prefer to make them of iron coated with china, and finely turned with diamond tools." And the claim was first, for certain wooden rolls through which the meal was passed; secondly, for "the application of squeezing rolls having a surface consisting of material containing so much silica as not to colour the meal or flour, and so as to have the hardness required for the purpose set forth;" and thirdly, for the scrapers for the rolls.

The defence upon which the Defendants chiefly relied, and the only point argued before the Court of Appeal, was that the specification was insufficient, inasmuch as the only rollers which would answer were not enamelled rollers but thick rollers of an exceedingly hard china, such as had scarcely been made in *Europe* during this century, and fixed to an iron core or spindle by a thick bedding of sulphur; and that no miller or skilled mechanic would discover this from the specification, without making experiments.

(1) 3 Ch. D. 531, 582.

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The action came on for trial before *Fry*, J., on the 2nd of December, 1878, when many practical and scientific witnesses were examined. According to their evidence, wheat after grinding is separated into fine flour, middlings, and pollard bran, &c. The middlings are ground again, but in the process the coverings of the granules of flour are crushed and become mixed with the flour and discolour it; but by squeezing or crushing the middlings between rollers this is avoided. It seemed that squeezing rollers had been used by millers before, but the Plaintiff seemed to be the first person who proposed to use china for the rollers. It was, however, admitted that the only china which would answer the purpose was a very hard china, containing at least 70 per cent. of silica mixed with a proper proportion of alumina, which was a much larger proportion of silica than had been used in *England* during this century (except for small crucibles), though Oriental china as made in *China* was of that description. The Plaintiff himself obtained his rollers in *Italy*, where the process of making them was said to be a secret. The rollers must also be very thick and fixed on the iron cone with an elastic bed of sulphur, or with an air-chamber between them. It was admitted that china enamel on an iron roller would not bear the work. The surface of the rolls must also be of a peculiar texture, exceedingly hard but not brittle and not too smooth. Degrees of hardness are indicated by a scale running up from 1 to 10, and the husk of corn was of the hardness of 7 or thereabouts. It was stated that diamond tools had not been used for turning china, and it was disputed whether softer china could be turned with a diamond tool. Mr. *Bramwell*, one of the Plaintiff's witnesses, said that he might, in constructing the machine from the specification, have fixed the roller on to the spindle with sulphur or elastic cement, but that he might have fixed it directly on to the iron spindle; and this, it was admitted, would not answer, as the expansion by heat would burst the roller. He was, however, not a practical miller. Mr. *Copeland*, a china manufacturer, said that he thought that by the aid of the specification he could make the china required, but not without experiments. Witnesses for the Defendant said that they could not from the specification have made the china required; and others said that they should have concluded that the rollers

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were to be of iron enamelled with china. Mr. *Doulton* was of opinion that he could make the rollers. The evidence is further stated in the judgments of *Fry*, J., and the Court of Appeal.

Sir *J. Holker*, A.G., *H. Matthews*, Q.C., *Aston*, Q.C., and *Carpmael*, for the Plaintiff:—

The use of the word "china" in the specification is enough to inform an expert of the proportion of silica which the material should contain. The specification is addressed to persons who have some knowledge of the subject, and the fair conclusion from the evidence is that such persons would have no difficulty in constructing the machine from the description. It is not necessary that the patentee should describe the construction of every part of the machine. *Plimpton* v. *Malcolmson* (1) shews that when the patent is for an invention communicated from abroad, the patentee need only tell the public what he himself knows; the patent is not void because the original inventor knew something more which he did not communicate to the patentee.

[FRY, J:—If the patentee "does not communicate all he knows, his specification is bad:" *Lewis* v. *Marling* (2). Can the patent be valid if the foreign inventor has not communicated all he knows to the patentee?]

Plimpton v. *Malcolmson* shews that the patent would still be valid if the patentee had fairly communicated to the public all that he himself knew. The bargain is between the public and the patentee, not the original inventor. In addition to the use of the word "china," there is the statement that it is to be turned with a diamond tool. That implies that the material is to be very hard.

[FRY, J:—China is only spoken of as one material of a class that will answer the purpose, and the class is not confined to china. The degree of hardness required is not mentioned, and the necessary quality of toughness is not referred to. Nor is there any mention of the peculiar surface.]

China is only mentioned preferentially. The claim is not bad because it may possibly include some material better than anything that was known at the time. The claim is only worded so

(1) 3 Ch. D. 531, 582. (2) 1 Webst. P. R. 493, 496.

as to guard against something that might be a departure from the necessary conditions. It simply means that any silicious substance without cavities and that will not disintegrate will answer the purpose. We do not ask for a "benignant interpretation" of the specification; we only want it to be construed with a "willing mind."

[FRY, J.:—The evidence shews that "hardness" without "toughness" will not do; the two must be combined. What reference is there to "toughness"?]

It does not appear that any known substance has the one quality without the other.

[FRY, J.:—Some such substance may be discovered. Highly silicated glass would come within the description, but the evidence shews that it would not answer the purpose.]

A patent is not bad because the patentee may have attributed the merit of his invention to wrong causes. But the words in the second clause, "so much silica as not to colour the meal," are sufficient to inform a skilled workmen that there must be such a proportion of alumina as to prevent disintegration. As to the third claim, it is not for the scrapers in any combination whatever, but only for the purpose shewn. As the Master of the Rolls said in *Plimpton* v. *Spiller* (1), "it is the duty of the Judge to adopt the construction which makes the patent reasonable and sensible, rather than that construction which makes the patent utterly absurd." And in the same case (2), Lord Justice *James* said, "You must always construe a claim with reference to the whole context of a specification." The whole scope of the invention must be looked at.

Fischer, Q.C., and *Fryer*, for the Defendants:—

The specification is insufficient, ambiguous, and misleading; it would not enable a skilled workman to construct the essential part of the machine, *i.e.* the porcelain coating of the rolls. There is no sufficient description of it, or of the mode of making it. The patentee ought to have told the public how to make it or where to procure it. He has not done this; he has only indicated a process

(1) 6 Ch. D. 412, 423. (2) 6 Ch. D. 427.

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more or less laborious, by which a material possessing the necessary qualities may be discovered. "It is the duty of a patentee to specify the plainest and most easy way of producing that for which the patent is granted, and to make the public acquainted with the mode which he himself adopts:" *Savory* v. *Price* (1). That has not been done here. It has not been stated whether any china manufacturer can make the material required. No witness has been produced who having simply the specification before him has made the thing. That is a proper test of the sufficiency of the specification: *Cornish* v. *Keene* (2).

[FRY, J.:—Is that a necessary condition?]

It is one element in the case. The duty of a patentee as to giving information is illustrated by *Muntz* v. *Foster* (3); *Turner* v. *Winter* (4); *Patent Type Foundry Company* v. *Richard* (5); *Wood* v. *Zimmer* (6). *Mr. Bramwell* in his evidence mentions three ways of fastening the porcelain cylinder to the iron spindle. Neither of the three, nor which is the best of them, is suggested in the specification. With regard to the preferential claim, in *Crompton* v. *Ibbetson* (7), the patentee said that he preferred a particular material, though he knew from repeated trials that no other substance would do, and Lord *Tenterden*, C.J., said, "other persons misled by the terms of the specification may be induced to make experiments which the patentee knows must fail; and the public therefore has not the full and entire benefit of the invention."

The Plaintiff's case is that the knowledge which must be communicated is that of the patentee and that there is nothing to shew that *Palmer* did not communicate all that he knew. *Plimpton* v. *Malcolmson* (8) does not establish any such principle; if it did, then the more ignorant the patent agent the better the patent. *Plimpton* v. *Malcolmson* was quite a different case. The specification must describe the nature of the invention, and how it is to be performed; how can the knowledge of the patent agent affect that? Suppose the Plaintiff knew two ways of making the porcelain rollers, one

(1) 1 Webst. P. R. 83.
(2) Ibid. 501, 502.
(3) 2 Webst. P. R. 96, 109.
(4) 1 Webst. P. R. 77, 80, 81.
(5) Joh. 381, 385.
(6) 1 Webst. P. R. 44, 82.
(7) Ibid. 83.
(8) 3 Ch. D. 531.

very expensive and the other inexpensive, and he had only communicated the expensive method to the patentee.

[FRY, J.:—If the method which is communicated is useful and novel, the patentee is the true inventor of that, and not the less so that a better method is known to some one else.]

Here the Plaintiff himself has said that he does not know how to make the porcelain shell. His first claim is only for the application of a well-known tool to a certain purpose. The second claim is for every material, whether then known or not, which possesses the qualities mentioned. That is too wide. The third claim is simply for the scrapers, not for the mode of application, as in *Plimpton* v. *Spiller* (1). That is a claim for what was well known before: *Hastings* v. *Brown* (2). It is admitted that the manufacture of the porcelain rollers is a trade secret, and that they can only be made abroad, and that is why the Plaintiff can give no information about them. The very object of the patent law is thus evaded. The public are not put in possession of the mode of making the invention when the patent expires.

[FRY, J.:—If a patentee says you are to use leather, he is not bound to state the whole process of tanning.]

This porcelain is a new material. Mr. *Copeland* thought he might be able to make it, but he was not sure. The patentee ought to have disclosed the mode of making the porcelain rolls, or it should have been shewn that at the time when the patent was granted it was known to all porcelain manufacturers in this country.

Sir *J. Holker*, in reply:—

The specification, when fairly read, is amply sufficient. The patent is not for the manufacture of the material with which the iron rolls are to be coated; but for the use of squeezing rolls coated with a material not previously used for that purpose, but still a known material.

[FRY, J.:—There is no evidence that this material was known before. The only material you have mentioned is china, and the evidence shews that all china will not answer the purpose. The

(1) 6 Ch. D. 412. (2) 1 E. & B. 450.

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material which you use is not a common article which you can go into a shop and order. It must possess certain qualities; are you not bound to point out what they are?]

The specification has in effect done so. Toughness is implied from the statement that the material must not colour the meal. The fact that one roller is to turn the other implies that the surface must not be too slippery.

[FRY, J.:—The patentee must state not merely the problem which is to be solved, but the mode of solving it.]

Here he has stated all the necessary qualities of the material. If he had said, I use china for my rolls, that would have been sufficient. Why is the specification bad because he has said, I prefer one substance, viz., china, but for ought I know there may be many others which will satisfy the conditions? *Ralston* v. *Smith* (1) is in point. The patentee has in effect said, "I make my rolls of china, or of any other suitable material." If he knew of any other substance which would do, then *Crompton* v. *Ibbetson* (2) would apply. But he did not.

[FRY, J.:—In *Ralston* v. *Smith* the application of the material was the novelty; here the material itself is new.]

Macnamara v. *Hulse* (3) is another authority. As to the objection to the use of the word "coated" with china, the evidence shews that though, in the ordinary sense of the word, you cannot coat iron with china, you can, so to say, put a jacket of china on the iron. As to the claims, if they are awkwardly worded, the title of the patent and the whole of the specification must be looked at. The claim for the scrapers is only as they are described in fig. 5. *Plimpton* v. *Malcolmson* (4) shews that that is a good claim. If the specification were put into the hands of an ordinary workman, and the china rolls were given to him, he could construct the machine. Of course, the china roll must be obtained from a manufacturer of china. There is no difficulty in fastening the china to the iron; brimstone cement is well known, and commonly used. The manufacture of true china is not a trade secret; this material is true china. The specification has mentioned a known

(1) 11 H. L. C. 223, 248.
(2) 1 Webst. P. R. 83.
(3) 2 Webst. P. R. 128, n.
(4) 3 Ch. D. 531.

material which will do, and that is enough. There is no difficulty in obtaining true china. The required substance is sufficiently described. The patentee has said, My purpose may be accomplished by using a material A, or other materials which possess the same qualities. That is not the same thing as if he had said, Use A, B, C, or D, and it had turned out that D would not answer.

FRY, J.:—

The Plaintiff sues as the assignee of letters patent granted on the 6th of March, 1874, to a Mr. *Palmer* for "an improved machine or apparatus for treating or preparing meal." He also sued originally as the assignee of other letters patent granted in 1876 to *Palmer*, but very early in the proceedings the Attorney-General expressed his intention of not claiming any relief in respect of those letters patent, and the question therefore turns exclusively on the patent of 1874. Mr. *Palmer* received from the Plaintiff, who was residing at *Naples*, a communication of the invention which is intended to be secured by that patent, and it appears to me clear that before the month of March, 1874, a very useful invention had been discovered by the Plaintiff.

The sole question which I have to determine is as to the sufficiency or insufficiency of the specification, the questions of utility, novelty, and infringement which were originally raised not having been insisted upon. I must, therefore, in the first place, inquire what was really the invention of the Plaintiff. It appears to me that the invention really consisted in the application of squeezing rolls to the meal which comes from the ordinary mill stones, leaving out of course all the fine flour which is produced in that first process, and the result which the Plaintiff successfully arrived at is, the making from that meal, or middlings as it is sometimes called, of a flour as fine and valuable as, or even finer and more valuable than, that which originally comes in smaller quantities from the mill stones. This result he has arrived at by the use of rolls. These rolls do not grind like the mill stones, but they squeeze. In saying that I do not forget the criticism of Mr. *Imray*, which goes to shew that there is a certain amount of difference in the rate at which these rolls are driven, and that

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consequently a small amount of grinding action takes place. It appears to me, however, that that is not sufficient to affect the general nature of the operation performed by the Plaintiff, which is squeezing. The squeezing operates in this way. The meal which is subjected to it consists in part of flour contained in cells, and those cells are burst by the squeezing operation. The advantage which squeezing possesses over grinding is, that, whereas squeezing bursts the cells and lets out the flour, it does not in any way triturate the other ingredients of the meal; it does not grind up with the flour the germ or the husk, but allows those substances, which may be treated as impurities, to fall down in their original condition, and therefore they are more easily separated afterwards from the fine flour which has been produced by the bursting of the cells.

I must next inquire what are the special qualities which these squeezing rolls must possess, particularly as it appears that squeezing rolls are not in themselves new, and, as I gather, they are not new in regard to milling operations. It appears that the rolls used by the Plaintiff possess a hardness of between six and seven degrees, measured according to the usual table of hardness, and that they are constructed of a species of china or stone or hardware which, according to Professor *Church's* analysis, contains from 72 to 73 per cent. of silica. The reason of this hardness being required is twofold. They must be hard, in the first place, in order to break the cells, and in the second place, in order that they may resist the operation of the husks, which constitute a part of the meal, and which on their outer surfaces are coated with silica, having a hardness of about 7. It appears, in the next place, that these rolls must not only be hard, but they must possess a certain incapacity to disintegrate, they must not be susceptible of coming off in the operation, so as to colour the meal, or render it impure. Now what is it which produces in the material actually used by the Plaintiff that incapacity to disintegrate? It appears from the evidence before me that it is due to the presence of alumina, which is found in the material of which these rolls are made to the extent of about 23 per cent., and that where that alumina is wanting, though the other ingredients are similar, the result is that with,

perhaps, a hardness as great as in the rolls of the Plaintiff, there co-exists a brittleness which renders portions of the material liable to come off in the process of squeezing. In addition to these qualities, there is a third, viz., the peculiar surface of these rolls, which Mr. *Bramwell* has said is, in his opinion, an important part of the invention. The surface must be neither slippery, nor so porous as to squeeze unevenly. It appears that if the rolls were slippery, not only would they probably slide the one upon the other, but the meal would slide upon the top of them, and would not pass through in the manner described. To use the language of Mr. *Matthews* in opening the case, a certain amount of grip of wheel upon wheel is necessary for the perfection of the operation. Of course the peculiar surface is not necessarily involved in the idea of a squeezing roll, because a squeezing roll may be one in which this grip is wanting, but in which the material to be squeezed may be driven between the wheels by pressure or otherwise, and may then be operated upon. It appears that steel rollers may squeeze, although they have not this peculiar surface.

Looking at the evidence before me, I have come to the conclusion that the use in a squeezing apparatus of rolls having these peculiar characteristics is the essence of the Plaintiff's invention.

There is one other matter which requires to be attended to, viz., the method in which the china or porcelain rolls are attached to the machine. Now, at the time when the patent was taken out, they were in fact attached in this way; a wrought-iron spindle passed through them, upon that spindle there was a cast-iron boss of considerable thickness, upon the cast-iron boss there was a thick bed or layer of brimstone or sulphur cement, and upon that came the thick china roll or cylinder. It appears that the sulphur had an important use in the construction of the apparatus. Iron is, of course, liable to expansion by heat, and its expansibility is greater than that of china; the result therefore of bringing the china and the iron into immediate contact with one another would be that the china might crack when the iron became hot, and this would be seriously injurious to the success of the Plaintiff's invention. It appears to me from the Plaintiff's evidence that this was found to be so in fact, and that the interposition of the sulphur

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removed that difficulty, because when the iron became heated the sulphur melted, and of course the result of that was to diminish the heat of the iron and also to interpose a substance between the iron and the china. A further reason for the interposition of brimstone was suggested, which appears to me a very probable one, viz. that brimstone, as compared with china and iron, is an elastic substance, and that the interposition of that comparatively elastic substance between the two hard ones prevented the cracking and breaking which blows might produce in china, if no such substance had been interposed. At any rate, this appears from the evidence before me, that cylinders made in the manner which I have indicated have been successful, and it has not been shewn that any other cylinders varying materially from those have been successful, with the single exception of a new form of roll which was invented by the Plaintiff in the year 1876, and which consists of an iron spindle with a china roll at a very considerable distance from it, having a large air chamber between it and the spindle, and fastened to the spindle by means of caps or plates at the two ends, supported by three or four iron bars passing through the air-chamber and connecting the caps together.

That appears to me to be the substance of the Plaintiff's invention. How far it would be possible to vary in any parts from the form of roll which I have described without destroying the utility of the invention, I cannot tell. But I have this striking warning before me of the danger of assuming that variations would be unimportant, that Mr. *Bramwell*, than whom no one could be more experienced in such matters, described a mode of joining the iron and the china which, in his opinion, would have answered, yet which, according to the evidence of the Plaintiff, would have been dangerous, and would probably not have succeeded.

Such being the invention, I have next to inquire what is the specification, and whether it fairly and with reasonable exactitude and precision describes the invention. Now, before I answer that question, I would say that I approach the subject bearing in mind the decisions which have been given upon the mode in which the Court should view specifications. I refer amongst others to the expression of opinion of the present Master of the Rolls in *Plimpton*

v. *Spiller* (1), that "it is the duty of the Judge to construe a specification fairly, with a judicial anxiety to support a really useful invention if it can be supported upon a reasonable interpretation of the patent; or, as Mr. *Aston* said, that a Judge is not to be astute to find flaws in small matters in a specification with a view to overthrow it." I am bound by that expression of opinion, and, if I were not bound by it, it entirely agrees with my conception of the proper way of construing a specification. At the same time it must be borne in mind, to use the language of Mr. Justice *Ashhurst* in *Turner* v. *Winter* (2), that "it is incumbent upon a patentee to give a specification of an invention in the clearest and most unequivocal terms of which the subject is capable. And if it appear that there is any unnecessary ambiguity affectedly introduced into the specification, or anything which tends to mislead the public, in that case the patent is void." And in the same case (3) Mr. Justice *Buller* thus lays down the principle which he considered proper to be applied in approaching the interpretation of a specification: "When attempts are made to evade a fair patent I am strongly inclined in favour of the patentee; but where the discovery is not fully made, the Court ought to look with a very watchful eye to prevent any imposition on the public." Does then the Plaintiff's specification, read by the light of these authorities, fairly and honestly disclose the invention which I have described? I have read the whole of the specification, and I have come to the conclusion that it does not fairly and honestly and with sufficient exactitude describe the invention which had been made by Mr. *Wegmann*. To prevent all misunderstanding, let me say that it does not escape me that Mr. *Wegmann* is not the patentee, but that Mr. *Palmer* is. But the question, although different in form, is the same in substance, because if Mr. *Wegmann* did not communicate to Mr. *Palmer* the invention with sufficient exactitude to enable him to describe it so that the public in *England* reading the specification might be able to understand it, then no true invention was communicated by *Wegmann* to *Palmer*, and *Palmer* was not the first and true inventor within the meaning of the statute.

(1) 6 Ch. D. 412, 422. (2) 1 Webst. P. R. 80.
(3) 1 Webst. P. R. 81.

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I have said that, in my opinion, the specification does not disclose the invention with sufficient exactitude. The parts which, while considering the specification as a whole, are specially material, are this passage: "The squeezing rolls are to have a surface consisting of material containing so much silica as not to colour the meal or flour. I prefer to make them of iron coated with china, and fine turned with diamond tools," and the second claim—"The application of squeezing rolls having a surface consisting of material containing so much silica as not to colour the meal or flour, and so as to have the hardness required for the purpose set forth." Undoubtedly, a person reading that specification must come to the conclusion that the material which is preferred by the patentee is china, and china of a very hard description. Now, it appears from the evidence, that the difficulty of making china increases very greatly in proportion to the hardness required, and that the word "china," as used in *England* at the time when this specification was taken out included many materials which would be absolutely useless for the purposes of the invention. It will be observed that the word "china" is used in the specification without any adjective of the description which has been so often put before it in the course of this discussion, "true" china, "Oriental" china, or "Chinese" china, and which adjectives are intended to confine the application of the word "china" to that which has been said to be china *par excellence*, according to the proper meaning of that word. It appears from the evidence that true china, that is, "Chinese or Oriental china," contains silica varying from 65 to 73 per cent., that such china has never been made in *England* since the year 1789, except possibly in very small quantities for chemical instruments, that it was made down to the end of that year at *Plymouth* and *Bristol*, the material there made containing silica to the amount of about 60 or 70 per cent.; and that there has since been made in this country, at various places, that which is not properly called china, but which we all probably know by the name of china, a material which contains about 40 per cent. of silica. As I have already said, a person reading this specification would come to the conclusion that a very hard china would be required; but the extent of hardness is a very important question to a person who has to act upon

this specification, for the reason which I have already mentioned, that the difficulty of making the china increases with the hardness of the material. Now, in many ways the degree of hardness required might have been indicated with much greater precision than it has been in the specification. Attention has been called to what has been termed the equation of hardness in this case, viz., that the roll must equal in hardness the harder portion of the meal, *i.e.*, the silicated portion of the husk which has the hardness of 7. That is one way in which the necessary hardness might have been indicated. It might have been indicated by the proportion of silica in the material employed by the Plaintiff, which has been found to be 72 or 73 per cent. It might have been indicated by the degree of hardness in the table of hardness, which is proved to be from 6 to 7. All or any of these methods might have been resorted to, but none of them was. It is said, and said truly, that the material is to be turned with a diamond tool. That probably indicates a very hard material, but it does not appear that the diamond tool ever was applied in *England* to china, and the hardness therefore, which that imports, was not a thing known in the trade. It was indeed suggested that soft china could not be turned with a diamond tool, but the evidence of the china makers was to the contrary. They said that in all probability the diamond tool could be applied to soft as well as to hard china. Therefore, although I come to the conclusion that hard china is pointed out in the specification, it appears to me that the information which the Plaintiff himself told us he got for the purpose of his invention from a professor of chemistry, viz., that the material must contain 70, or upwards of 70 per cent. of silica, was not indicated to the person who was to act upon the specification, but that he was left to find out as best he could what amount of hardness he must reach before he could be able to use the rolls for the purpose of the invention, and that, as it appears to me, he would not have been able to discover without very considerable investigation and experiment. All that knowledge would have been necessary before the useful invention could be arrived at, and all that ought to have been communicated to the public. But, further than that, there is a difficulty in the way in which the china is to be applied to the iron. The

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Plaintiff says that he prefers to make the rolls of iron "coated" with china. About that word "coated" great controversy has existed. It has been said in the first place that "coating" with china naturally means the placing upon the iron of a film of china in a manner analogous to the process of enamelling on iron, and I am very much inclined to think that that is the true and primary signification of "coating" iron with china. It is said that that conclusion would be absurd, because china of the hardness required must be subjected to a greater heat than iron will sustain, and the iron would therefore melt in the operation. That may be so, but it does not follow that every person would know it, especially as it appears that the operation of coating with an enamel not very dissimilar in its composition is well known, and that that enamel is sometimes called china. But, even supposing that is not so, and that the Plaintiffs are correct in their view, that there are three modes in which this coating might be effected, what are the three modes as described by Mr. *Bramwell*? One is attaching the china cylinder to the iron spindle by means of a cement or bedding, such as sulphur. Another is attaching it by means of flanges of iron or flanges of the china roller, so that in parts the iron and the china may meet and in parts they may not meet. The third which he described is hollowing out the china to a perfect circle and cutting the iron to the same size, and then inserting the one into the other. It appears from the evidence that the third of those methods, which Mr. *Bramwell* considered to be included in the "coating" referred to in the specification, would not answer the purpose, because a china roll connected in that manner with iron would be exceedingly liable to break. Therefore, to say the least, there is the greatest ambiguity in the description, and the Plaintiff has not condescended to give those particulars which are necessary in order to satisfy the condition that he should particularly ascertain and describe the nature of his invention and the manner in which the same is to be performed.

But a further difficulty remains. I have already pointed out that iron coated with china is only the preferential mode mentioned in the specification. A whole class of materials is, I think, suggested, viz., "any material containing so much silica as not to

colour the meal or flour." It is said that the material preferred by the Plaintiff is iron coated with china. But, before you can prefer one thing to another you must have several things among which the choice can be made, and if the only thing which, so far as the Plaintiff has ascertained, can be shewn to answer the purpose is a particular china roll, and he leads the mind of the reader to infer that there is a whole class of silicated materials which might answer, he has, as it appears to me, been giving a misleading description of his invention. He has indicated that there is a *genus* wider than the the *species* which will answer, whereas in fact it is only the species which will answer the purpose in question. The effect of the description is to lead the mind of the reader to the necessity of making experiments with regard to the other classes of material which are indicated.

Now I will read together, because it appears to me that by so doing I shall interpret the specification most in the Plaintiff's favour, that clause which I here already quoted and the second claim, and I will inquire what is the class of materials which he claims as being part of his patent for the purpose of these rolls. It appears to me that he says they must have two qualities. First, they must have so much silica as not to colour the meal or flour. Now, in my opinion, that is a misleading statement of the quality required. The evidence shews that you may increase the amount of silica as much as you will, and yet the material will come off and will colour the flour, unless you do something to give toughness to it. The only material which has been shewn to answer the purpose is one which contains a considerable proportion of alumina, and, according to Professor *Church's* evidence, the toughness of the material, its incapacity to disintegrate, is due to the presence of that alumina. You must have, in short, the stickiness of the clay together with the brittleness of the flint. To tell the reader of the specification that what you require is a material containing so much silica as not to disintegrate, is, in effect, to assert that non-disintegration is a function of silica, whereas it is really a function of silica and alumina united. In the next place, the specification says that the material must have the hardness required for the purpose set forth. That is a thing which, I repeat, as it appears to me, so far as the specifica-

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tion goes, can only be ascertained by experiment, and, for this reason, that the process of squeezing meal in this manner by rolls subject to this sort of operation is a new invention, and therefore the hardness required is not known. It is not shewn by reference to any standard, and yet amount is an essential piece of knowledge before a person can satisfactorily make these rolls without further experiment. In my judgment, any china manufacturer who was instructed to make these rolls would fail to do so until the roll had been employed in the squeezing operation in a mill, and found to be either hard enough or not hard enough. But there is, as I have already pointed out, a third quality which it is requisite that the material should possess, and that is the peculiar surface of the roll. In that respect I find the enumeration of the qualities of the class of materials, which the Plaintiff claims, to be entirely wanting. It is no doubt suggested that I can read that quality into the claim, because china is referred to: in other words, it is said, you may narrow the genus of things claimed down to the species, because one substance is mentioned as that which the patentee prefers to use. That is not a sound or indeed a possible way of reading the specification. It appears to me the patentee's object in making this wide claim was this; he in substance says, "I have found one thing, and I mean to claim everything else which will answer the purpose." I certainly will not decide that he might not successfully have made a claim to that effect. But I think that, before such a claim can succeed, he must limit with exactitude the class of things which he claims. I think he might have done so in one or other of two ways; by enumerating the qualities which the material must possess, or by referring to a particular substance, and saying that all other materials which had the qualities possessed by that for the purpose of this machine were within the specification. I think that in this case the patentee has done neither the one nor the other; but that, not knowing, or not caring to ascertain, the class of materials which would answer his purpose, he has endeavoured to throw the drag net of his specification so widely as to include everything which might possibly answer, and that it does in fact include materials which would not answer the purpose.

I have gone into all this detail with regard to the specification

because it has appeared to me necessary and desirable so to do; but I repeat that the questions upon which I mainly determine this case are simple ones: first, what is the Plaintiff's invention; and secondly, does the specification fairly and honestly and with reasonable precision state that invention so that a workman of ordinary skill would know how to reproduce it. Now I think that, even if a person of Mr. *Imray's* experience had this specification placed in his hands (I select Mr. *Imray* because he has been an actual maker of flour mills and roll mills), I think if he had this specification put into his hands, with no further instructions, he would not have had before him the materials which would have enabled him without further experiments to construct the Plaintiff's machine. It is possible, indeed very probable, that by means of further investigation and experiments he might have succeeded, but I think that the success which he might ultimately have attained would have been due, not to the specification alone, but to the specification and the experiments which he ought not to have been required to make.

On that broad ground I decide that the specification is insufficient, and the result of course is that I give judgment for the Defendants.

The Plaintiff appealed. The appeal came on to be heard on the 21st of June, 1879.

Sir *J. Holker*, A.G., *H. Matthews*, Q.C., *Aston*, Q.C., and *Carpmael*, for the Plaintiff:—

The specification does not pretend to describe the mode of making china, but describes the construction of the mill, of which the rollers are only one part, and says that the surface of the roll must be of hard china, and that is sufficient. Coating iron with china means covering it with china of any thickness. No doubt there are faults in this as in every other specification, but it must be read fairly: *Beard* v. *Egerton* (1). The roller is stated to be of silica, and no doubt in order to make china of this it is necessary to mix it with alumina, but any maker would know; and it is to be on an iron spindle, and of course must be properly fixed to that

(1) 8 C. B. 165.

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spindle: *British Dynamite Company* v. *Krebs* (1). No china rollers had been used for this purpose until this patent was taken out. The real questions are these:—1. As these rollers were to squeeze meal, does the specification inform a competent person that a jacket or cylinder was to be used? 2. Does it inform him of what the jacket is to be made? 3. Does it indicate how to obtain cylinders of suitable material? 4. Does it shew him how to fix the jacket on the spindle? All these questions must be answered in the affirmative.

Kay, Q.C., and *Fischer*, Q.C. (*Fryer* with them), for the Defendants, were not called upon.

Nov. 11. The judgment of the Court (*James*, *Baggallay*, and *Thesiger*, L.JJ.) was delivered by

THESIGER, L.J.:—

The question to be decided in this case is whether the patent, the subject of the action, is bad on the ground of the insufficiency of the specification. Mr. Justice *Fry* has held that it is bad, and we are of opinion that he has rightly so held. The circumstances which led to the patent, and the problem which the patented invention was intended to solve, may be stated thus:—Under the old milling process, it was the practice, after the fine flour which was the product of the first grinding had been separated from the "middlings," to submit the latter to a second grinding, for the purpose of extracting the flour contained in what may be termed the kernels of the grain, and which remained uncrushed in the first operation of grinding. The effect, however, of subjecting these kernels to the grinding process was to triturate the skin or envelope which enclosed the flour, and, by the mixture of triturated portions of the skin or envelope with the flour, to render it less valuable. Prior to 1874 the idea of separating the flour of the kernels from the skin or envelope, through the medium of squeezing rollers, applied either to the middlings or to the meal, instead of going through a second grinding operation, had become public property, and patents were taken out for different kinds of rollers. The Plaintiff, a foreigner, after making experi-

(1) H. L. April 7, 1879. (Not reported.)

ments upon iron, steel, and clay rollers, appears to have formed the opinion that such rollers would not be suitable to effect the desired result, but that rollers of which china of some kind was in some manner to form the face would answer the purpose. Accordingly, in 1874, through his agent, Mr. *Palmer*, and in his name, he took out a patent, stated to be "for the invention of an improved machine or apparatus for treating or preparing meal," which is the patent in question. Before adverting to the language of the specification, it is important to state certain facts in regard to china which appear in the evidence in the case. Oriental or Chinese china is of a very hard description, containing about 73 per cent. of silica. China of such a description was manufactured in this country during a part of the last century, but its manufacture ceased at the latter end of the century and has not been again resumed, except to a very small extent, as the material of certain chemical utensils. China or porcelain, such as is manufactured in this country, is much softer than this Oriental china, containing as it does only about 40 per cent. of silica, and the plant in use for the purpose of manufacturing the former would be, as a general rule, inadequate to the production of the latter. As a matter of practical experiment, no china softer than the Oriental china has been found to be suitable for the fulfilment of the objects which the patent in question has in view, and, as a matter of actual working of the patent, no material other than china manufactured abroad, and containing about 73 per cent. of silica, has been used. It was only after this litigation commenced that it was discovered, or suggested to have been discovered, that the stoneware manufactured by Messrs. *Doulton* at the *Lambeth Potteries*, where *Siemen's* furnaces are used, would answer the purpose. It is necessary that the china forming the material of the squeezing rollers should be of the hardness referred to in order that it may be harder than the husks of the grain, or meal, or middlings subjected to the rolling process, which themselves contain a large proportion of silica. But this by itself would not be sufficient, for, unless the brittleness of the silica were corrected by the addition of a due proportion of alumina, the china or material under whatever other name called would be friable, and portions of the material would be detached in the process of squeezing, and

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be mixed with the products of the operation, and thus cause discolouration of the flour. Given a proper material for the surface of the rollers, the mode of construction of the rollers remains to be considered. This, as appears from the evidence in the case, is no easy matter. In carrying out the invention, however, it seems to have been found that the rolling surface must be formed of a cylinder of china, and in practice the rollers have been constructed by placing the china cylinder round an iron centre, with a bedding of sulphur, which is a comparatively elastic material, between the iron and the china, so as to meet the difficulty arising from the greater expansiveness of iron over china. The only other method of construction which, upon the evidence, appears to have been treated as practicable is that by which the china cylinder would be left hollow, being attached to an iron axis by flanges. A third method, indeed, was suggested by Mr. *Bramwell*, one of the witnesses for the Plaintiff, viz., that of simply fitting an iron core into the hollow cylinder of china; but it was subsequently, on all hands, admitted that such a method was not practicable, while anything approaching to a mere china enamelled surface was not even suggested as being adequate for the proposed object. Turning then to the specification, we have to see whether it describes, to use the words of the 6th section of the *Patent Law Amendment Act*, 1852, "the nature of the patented invention, and in what manner the same is to be performed." In the specification it is said, "The squeezing rolls are to have a surface consisting of material containing so much silica as not to colour the meal or flour." If this sentence were to be taken in its literal import, and without any assistance from that which follows, it would be really meaningless, or at least so vague as clearly to give no proper description of the nature of the invention. There would be nothing to shew what material is intended, what amount of silica would be sufficient for the object in view, or what other ingredients are to be used with it; the mode of construction of the rollers is not described, and the expression, "so much silica as not to colour the meal," would be misleading, as importing that, provided there be a certain amount of silica in the material of the rollers, the non-discolouration of the meal follows as a matter of course, which is, as already pointed out, untrue.

But it is said on the part of the Appellant that the sentence in the specification which follows that just quoted gets rid of the ambiguity which it is not denied exists in the general description of the invention. This sentence runs thus: "I prefer to make them of iron coated with china, and finely turned with diamond tools." At first sight, undoubtedly, this additional sentence does not appear to go far towards clearing up what was ambiguous before. We pass by for the present the objection that it assumes by its very form that china is only one out of many kinds of material appropriate to the fulfilment of the desired object, and that there is, therefore, no explanation of what the genus intended is. But there are other more substantial and serious objections. The term "china" would at least include, if not primarily import, the material manufactured under that name in this country at the present time, and that material would not, as far as is known from practical experience, answer the purpose. Again, as regards the method of construction of the rollers, the expression "iron coated with china" would naturally import something like an enamelling with china, as was stated by the Plaintiff's own witness, Mr. *Copeland*, who, to the question as to what he understood by the expression "a coating of china," gave the following answer before Mr. Justice *Fry:* "If I were asked to coat a piece of china ordinarily, I should look upon it like the enamelled saucepans—that is what I call coating." But it is admitted that a roller so constructed would not answer the purpose. On the part of the Appellant, it is attempted to meet these objections by contending that by the term "china" in the specification is not meant what is popularly known as china, but what Mr. *Aston* terms "true china," to which, it is alleged, nothing answers but the Oriental china, or other china of the hardness of Oriental china. This contention is said to be supported by the reference in the specification to the use of a diamond tool, which, it is said, could only be required for a very hard material; by the specific mention of the requirement of hardness in the claim; and by the suggestion that, inasmuch as the material of the squeezing rollers must be of a greater measure of hardness than the hardest parts of the material to be squeezed, the hypothetical mechanic or mechanics must be supposed in constructing the rollers to know the measure

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of hardness both of the husks of the meal and of the china or china-like material to be used in the rollers, and in that way be led irresistibly to the conclusion that the so-called "true china," or some equally hard material, must be intended by the specification, and, having been led as far as this point, the proportion of alumina necessary to correct the brittleness of the china and give it the requisite toughness would follow as a matter of course, as it is said to do in the manufacture of china generally. Secondly, as regards the construction of the roller, it is contended that the expression "coated with china" should be read as equivalent to the expression "with a jacket of china," for the reason that no practical mechanic would fail very speedily to see, as Mr. *Copeland* said that he saw, that a mere superficial enamelling of china could not stand the hard work to which the squeezing rollers would be put. Mr. *Aston* therefore paraphrases the portion of the specification to which we have been particularly referring thus:—"The squeezing rollers are 'to have a surface such as hereinafter described, containing so much silica as not to disintegrate and discolour the meal or flour. I prefer to make them of iron with a jacket of true china and finely turned with diamond tools," and, having so paraphrased the specification, he contends that it is sufficient. We cannot accept the paraphrase, or accede to the contention. The invention consisted, not in the application of squeezing rollers to milling purposes, for such an application was not novel, but in the use of squeezing rollers of a particular material not in common use, and of a particular construction different from that of ordinary homogeneous rollers, and to be applied under conditions directed to the effecting of novel results. The material was one which might almost be said not to be the subject of manufacture in this country; the construction of rollers formed of a china cylinder with an iron centre or axis was absolutely novel, and it therefore behoved the patentee, in order to give the public the benefit of his invention, to describe very particularly the material required for the rollers, and the mode in which rollers of that material were to be constructed. We cannot think that he has done either the one or the other. The expression "true china" does not appear from the evidence to belong to either popular or technical phraseology, and there is nothing in the specification

which definitely points to the exclusive use of the china to which, by the counsel for the Appellant, the expression is appropriated. Every step in the application of the invention as specified would necessitate experiment, not merely for the purpose of adopting the best among many known materials and modes of construction comprised in a general description in the specification, but for the purpose of discovering a suitable material, and finding a practicable mode of construction. As regards the obtaining of the proper material, the so-called 'true china," the Plaintiff's own witness, Professor *Church* could not go further then to say that in *England* there are small quantities of hard china still made, and if you were to hit upon the right person there would be no difficulty in obtaining the proper material, and Mr. *Copeland*, an experienced manufacturer of English china, was obliged to admit that the specifications and drawings referred to in it would not enable him to construct the required rollers without a series of experiments. The nature of the material required is really not described at all, unless the general words of the specification be limited so as practically to confine it to a material which is only stated to be preferentially used. The material particularly described is described by a generic term, which comprises a variety of species, the large majority of which would be unsuitable for the purposes required; the abstraction of several species, by making hardness of the essence of the particular species to be used, falls short of a proper description of what that species is to be; for even if it be considered unnecessary to refer to those elements which give the material its proper toughness, at least a more definite description of the measure of hardness is requisite; and, finally, assuming the material to have been properly specified, and that, as regards the method of converting that material into suitable rollers, the specification is not to be read as, according to its ordinary, and we may, after Mr. *Copeland's* evidence, add its technical signification, it ought to be read, in which case the desired result would not be achieved, we have still a specification giving so inadequate a description of the method of construction that an experienced china manufacturer would only be able to construct the rollers at all after a series of experiments, and a very able mechanical engineer is led by it to suggest, among other methods of construc-

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tion, one which it is not now disputed, would fail. However much we may desire to uphold a patent for an invention which has in the result developed into a useful adjunct to milling operations, we cannot see any valid ground for impeaching the judgment of the Court below, and the appeal will therefore be dismissed.

JAMES, L.J.:—

I may add the following words. The patentee could have described the machine which he has actually constructed, and which he claims to be his invention, in simple words, intelligible to any miller and to any maker of mill machinery thus:—"I make the rollers or hollow cylinders of hard china, which I have obtained at the works of a certain maker, and having turned them with a diamond tool, I place them round a core of iron, with a bedding of sulphur between the iron and the china." He might have gone on, and probably would have gone on to say, "Other modes of construction may be adopted, but what is essential is that the rollers should have a surface of hard china, like the true or Oriental china, or of a china-like material, sufficiently hard, but not brittle." It seems to me impossible to say that the words actually used in the specification would convey, even to a well-informed miller or to a more than ordinarily skilful maker of mill machinery, or to the two in consultation, that meaning, or anything like that meaning. If the patentee at the date of his specification had actually constructed rollers such as have been exhibited to us, he ought to have described them in plain language, and not in words which appear to me, not only insufficient, but, according to their plain natural import, wholly misleading; and it is not a sufficient answer to say that they are so obviously inaccurate that no one of competent knowledge ought to have been misled by them. I can conceive that millers and makers of mill machinery may be as ignorant as myself, and not know that an iron roller could not be coated with china capable of standing the work. The appeal will be dismissed, with costs.

Solicitors for Plaintiff: *Wilson, Bristows, & Carpmael.*
Solicitors for Defendants: *W. & J. Flower & Nussey.*

ARMITAGE *v.* ELWORTHY.

[1875 A. 86.]

C. A.
1879
FRY, J.
July 10, 11.
C. A.
Nov. 5.

Practice—Taking Accounts—Court Fees—Percentage on Receipts—Rules of Court, 1875, (*Court Fees*) *Schedule.*

A testator made two persons his executors, and the same persons, with one other, the trustees of his real and personal estate. A decree was made for the administration of the estate, and the usual accounts ordered to be taken. The Chief Clerk required separate accounts to be taken of the receipts and payments of the executors, and of the receipts and payments of the trustees:—

Held (affirming the decision of *Fry*, J.), that the accounts of the executors and trustees were rightly taken separately, and that the percentage for Court fees was payable both on the gross receipts of the executors and on the gross receipts of the trustees; and that the receipts of the trustees properly included (1) the residue handed over to them by the executors, (2) temporary loans advanced to them by their bankers, and (3) sums transferred from the trustees' deposit account at their bankers to their drawing account.

THIS was an appeal from a decision of Mr. Justice *Fry*.

The bill was filed by persons beneficially interested in the estate of *James Kershaw* for the administration of his estate, and for carrying into effect the trusts of his will. The executors of his will were the Defendants *Frederick T. Elworthy* and *Samuel Armitage;* and the same persons, together with the Defendant *Thomas Barnes*, were trustees of his real and personal estate.

By the decree, dated the 17th of July, 1875, before the *Judicature Act* came into operation, an account was directed (*inter alia*) of the personal estate come to the hands of the executors, and also an account of the personal estate remaining after payment of the debts, funeral expenses, and legacies come to the hands of the trustees.

In working out this decree, accounts were brought in which included the receipts and payments both of the executors and trustees, and shewed receipts amounting to £843,806 14*s*. But the Chief Clerk, on referring to the terms of the decree, thought it necessary to require that the executors and trustees should render their accounts separately, and fresh accounts were accord-

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ingly brought in, distinguishing the receipts and payments of the executors from the receipts and payments of the trustees.

By the draft of the certificate which the Chief Clerk proposed he found that the executors *F. T. Elworthy* and *S. Armitage* had received personal estate, not specially bequeathed, to the amount of £322,548 0*s.* 8*d.*, the whole of which sum they had accounted for, so that there was nothing due from them.

He also found that the trustees *F. T. Elworthy*, *S. Armitage*, and *T. Barnes*, had received sums to the amount of £852,715 16*s.* 10*d.*, and that, after allowing what they had accounted for, a balance of £17,599 8*s.* 3*d.* was due from them.

Under the old practice of the Court of Chancery the Court fee on the certificate would have been £1; but under the *Judicature Act* Rules a Court fee of 6*d.* for every £50 certified to have been received by executors or trustees is payable (1).

Under these circumstances the officers of the Court claimed a percentage of 6*d.* on every £50, both on the sum of £322,548 0*s.* 8*d.* found to have been received by the executors, and on the sum of £852,715 16*s.* 10*d.* found to have been received by the trustees. There was also a further account of rents and profits of real estate, shewing receipts to the amount of £21,466 16*s.* 3*d.* The total amount claimed by the officers of the Court was £598 6*s.*

The Plaintiffs contended that the percentage ought not to be paid twice over, but should be assessed only on the sum appearing to have been received on the joint account originally brought in.

Sums amounting to about £292,653, part of the sums received by the executors, had been carried over from the accounts of the executors to those of the trustees, and were included in the sum of £852,715 16*s.* 10*d.* before mentioned. The Plaintiffs contended that in assessing the percentage on the trustees' accounts this sum ought not to be included.

(1) Rules of Court, October 28th, 1875, (Court fees) schedule:—

"TAKING ACCOUNTS.—On taking an account of a receiver, guardian, consignee, bailee, manager, provisional, official, or voluntary liquidator, or sequestrator, or of an executor, administrator, trustee, agent, solicitor, mortgagee, co-tenant, co-partner, execution creditor, or other person liable to account, when the amount found to have been received without deducting any payment shall not exceed £200 . . . £0 2*s.* 0*d.*

"Where such amount shall exceed £200, for every £50 or fraction of £50 . . . . . £0 0*s.* 6*d.*"

With respect to another sum of £94,900 included in the trustees' account, it appeared that in cases in which a desirable investment by mortgage or otherwise presented itself, and the trustees had not in hand the amount required, they often obtained an advance of the sum required from their bankers, who allowed them to overdraw their account and charged them the interest. All these sums were repaid to the bankers in a short time, but appeared as receipts in the trustees' accounts. The Plaintiffs contended that they ought not to be included in the assessment.

The trustees kept a deposit account as well as a drawing account with their bankers, and amounts were from time to time withdrawn from the deposit account and carried to the drawing account. All these withdrawals, amounting to about £101,000, were entered as receipts in the trustees' account, and the Plaintiffs contended that they ought not to be included in the assessment.

The Plaintiffs accordingly took out a summons asking that the certificate of the Chief Clerk might be completed on payment of a Court fee of £354 1*s.* only, in lieu of a Court fee or percentage of £598 6*s.*, or that the certificate and the accounts might be remodelled so as to certify the accounts in such a form, or that the smaller Court fee of £354 1*s.* only might be payable.

The summons was heard before Mr. Justice *Fry* on the 10th of July, 1879.

Kekewich, Q.C., and *Method*, in support of the summons.

Rigby, for the official solicitor.

FRY, J.:—

I will look into the question as to remodelling the accounts. On the question of construction I have no hesitation in holding that the amount must be paid on what appears in the account. The words are "in taking an account of an executor or trustee or other person liable to account, when the amount found to have been received without deducting any payment shall exceed £200," &c. It is now said that that is a charge upon the net proceeds of the estate. The words do not allow, in my view, of any such construction. Then I do not think that in ascertaining

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the amounts payable on the accounts, you can consider whether or no one account covers the same amounts as the other; what is charged is the amount appearing in the account, and appearing in the account as a receipt without deduction. Now, if these items rightly appear in both the accounts, it follows that they must be charged in both the accounts. Each is charged separately.

On the question whether the accounts ought to be remodelled I will give my opinion to-morrow. In the meantime I will look into the accounts.

July 11. FRY, J.:—

This case stood over for me to consider whether I could allow the trustee's accounts to be withdrawn and remodelled. I think I ought not to do so. In the first place the schedule requires payment on the amounts of the receipts only which are found. It does not at all follow because the accounts brought in may admit a certain amount to be received, that therefore that amount will be found. I am bound to suppose that the proper amount only will be found to have been received by the executor or trustee. The accounts not being binding on the Chief Clerk, I do not think the accounts conclude the matter in any way. Accounts have been brought in in two forms before the Chief Clerk and they have occupied a considerable time: and there is nothing in my opinion to justify me in occupying the time of the officers in Chambers in again taking the accounts in the same form. I shall, therefore, decline the application. The result is that the summons is dismissed. The Plaintiffs must pay the official solicitor's costs. The Plaintiffs' costs will be costs in the cause.

The Plaintiffs appealed from this decision. The appeal was heard on the 5th of November.

Kekewich, Q.C., and *Method*, for the Appellants:—

We have two complaints against the order. First, that we are made to pay a percentage twice over by reason of separate accounts being taken against the trustees and executors: and

secondly, that the various sums transferred by the executors to the trustees, amounting to £292,650, and also the various sums included in the loan account, amounting to £94,900, and the sums transferred from the deposit to the drawing account amounting to £101,000, were not properly receipts by the trustees, but represented dealings with the assets of the testator after they had come into possession. If the parties had known in what manner the Court fees would be applied the accounts would have been framed in a different manner: and we now ask for leave to remodel the accounts so as to avoid this hardship.

Rigby, for the official solicitor, was not called on.

JESSEL, M.R.:—

I do not see how the Judge who decided this case could have made any other order than he has done. There were two acting executors and three trustees, two of whom were also executors. The decree directed the accounts of the executors to be taken, and the accounts of the trustees to be taken. The executors received very little more than the trustees, but still separate accounts were properly taken under the decree, and separate sums were properly found to have been received from the executors and from the trustees. Therefore the case comes literally within the words of the rule, and, as I happen to know, within the object and meaning of those who framed it. It was observed that the practice of administering estates in the Chancery Division had grown up gradually, and at the same time the necessary staff for taking the accounts had gradually increased, so that the expense of administering the estates was borne by the Consolidated Fund instead of by the persons for whose benefit they were administered. It was simple justice that they should pay a percentage. It was a rough way of apportioning the costs, although no doubt the effect was that to a certain extent the rich estates paid for the poor ones.

Then the question arose, in what way the assessment should be made. It would not have done to charge a percentage on the net surplus realized, for then the insolvent estates would have paid nothing, although they were the most troublesome to administer. Therefore it was thought the best plan to make the assessment

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on the whole sum found to be received, and to put the tax on that. This being so, it is clear that what has been done in this case is what was intended to be done when the rule was framed.

In the present case two other questions arise. Certain moneys had been put on deposit at the bankers and then withdrawn from the deposit account and placed to the drawing account, and drawn out by the trustees; and other moneys had been advanced by the bankers to the trustees. All these sums have been treated as receipts in estimating the percentage. Why should they not be so treated? I can see no reason for not including them among the receipts. I do not mean to say that with a view to avoiding the tax the parties might not have so arranged the accounts as not to let these sums appear as receipts; but in my opinion these accounts were properly framed as they were framed.

Therefore it seems to me that the case comes both within the letter and the spirit of the order, and the appeal must be dismissed with costs.

BAGGALLAY, L.J.:—

I am of the same opinion. I will only make this observation, that, although it is possible that the accounts might have been framed in such a way as to avoid this amount, I do not think they could have been framed honestly in any other way than that in which they have been framed.

THESIGER, L.J., concurred.

Solicitors: *Gregory, Rowcliffes, & Rawle; Reynell & Pemberton.*

BERKELEY *v.* STANDARD DISCOUNT COMPANY.

C. A. 1879 Nov. 5.

[1877 B. 504.]

Practice—Discovery—Answer to Interrogatories—Member of Company—Costs—Rules of Court, 1875, *Order* XXXI., *rr.* 4, 6, 10.

Where a member of a company is examined on interrogatories under Order XXXI., r. 4, he cannot refuse to file his affidavit until he has been paid his taxed costs of making it; nor will the Court make any order as to the payment of his costs separately from the costs of the company.

Semble, an ordinary member of a company ought not to be examined on interrogatories unless the Judge is satisfied that there is no officer of the company capable of making the discovery, and that the member proposed to be examined has the required information.

The decision of *Fry*, J., reversed.

THIS was an appeal from an order of Mr. Justice *Fry* (1).

On the 8th of May, 1878, on the application of the Plaintiff, an order was made by Vice-Chancellor *Malins* that the Plaintiff should be at liberty to deliver interrogatories for the examination of *J. C. Stirling*, a member of the Defendant company. *Stirling* had formerly been a director of the company, but had resigned his office in May, 1876, since which time he had not held any office therein, but was simply a shareholder. The person who was secretary of the company at the time when the transactions in question occurred was dead. *Stirling* then applied to rescind the leave so given, but his application was refused, the Judge being of opinion that he was a proper person to answer to the interrogatories (2). The interrogatories were accordingly delivered to *Stirling*, and an affidavit in answer to them was prepared on his behalf, but he refused to swear the affidavit until he had been paid his taxed costs of making it. The Plaintiff then took out a summons asking that *Stirling* might be ordered to answer the interrogatories within four days of the service of the notice upon him, and that the costs of the application might be costs in the cause.

Stirling appeared by a different firm of solicitors from those who represented the company.

The Judge made an order for *Stirling* to answer the interroga-

(1) 12 Ch. D. 295. (2) 9 Ch. D. 643.

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tories on payment of his taxed costs, and ordered the Plaintiff to pay the costs of the summons. From this decision the Plaintiff appealed.

Mulligan, for the Appellant:—

The order was made under Order XXXI., r. 4. That rule is an extension of the 51st section of the *Common Law Procedure Act*, 1854, which permitted interrogatories to be delivered to an officer of a company, and as a substitution for the old practice in Chancery of making an officer a party to a bill of discovery. The member is not interrogated as a witness, but as a *quasi* party to the suit. He ought to appear by the solicitor of the corporation so that there may be no extra costs. If he consults a separate solicitor it is unreasonable that his costs should be paid by the Plaintiff.

Buckley, for *Stirling*:—

The present rule goes further than the *Common Law Procedure Act*, and different considerations apply to it: *Wilson* v. *Church* (1). A member of a company who is examined is in the position of a witness, not of a party to the suit. He has no opportunity of seeing the pleadings and may not know what the issues are between the parties, nor whether the interrogatories are relevant or not. It is therefore right that he should have the protection of a separate solicitor and his costs guaranteed.

We do not insist that the payment of the costs should be made the condition precedent to the interrogatories being answered, but we say that the Court ought to make some order for payment of the costs. After the interrogatories are answered the member will have no *locus standi* in the suit to ask for costs.

Renshaw, for the company.

JESSEL, M.R.:—

I must say, speaking with the greatest deference to the learned Judge of the Court below, that I do not recognize the propriety of the new practice which he has attempted to introduce. He states himself that the matter, so far as he is concerned, is *res*

(1) 9 Ch. D. 552.

integra; but I may say, so far as I am concerned, that it is not, because I have made many orders under the rule. We have had a long experience under the *Common Law Procedure Act* of 1854. The only difference between the present rule and section 51 of the *Common Law Procedure Act* is, that in addition to the word "officer" you have "member." But why should this make any difference? The member is a partner, or *quasi* partner, in the company. By reason of our technical rule as to corporations, if the company is incorporated, the partners are not actually named defendants on the record, but the members are the real defendants, who together make the company, which is the defendant, and it is their property which is sought to be affected by the action. Therefore I can well understand that those persons who, if there had been no corporation, would have been actual defendants and liable to answer so as to give discovery, may, if the Judge thinks fit, be made to answer. I am by no means disposed here to lay down any rules which will fetter the discretion of any other Judge, but I will state that my own practice has been not to direct a member to answer if it be shewn there is an officer who could answer, that is, who had a competent knowledge of the facts. In this particular instance, it seems that the ordinary officer—that is, the secretary—is dead, and therefore he cannot answer. Secondly, I always require to see that the interrogatories are not served on a person who has not the means of answering. But the fact is, that the company is served with the application, and the company has as much interest as anybody else in seeing that the proper man should answer, because the effect of the answer may be very serious as regards the position of the company. I have never heard yet of any difficulty whatever. The ordinary practice, I believe, is for the company's solicitor to act for the officer or member who is directed to answer, and to prepare the answer for him, with the usual advantages which are possessed by the solicitor of the company, and to charge the company with the cost of so doing. I by no means desire to encourage the employment of a separate solicitor in such a case as this. The Defendant here is the company, and the person interrogated is making discovery on the part of the company, and therefore it appears to me that the ordinary practice is the proper one.

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Now as regards the costs of answering being costs in the action, I have never heard of such a question being raised. I have known the costs taxed over and over again as part of the company's costs in the action when the company succeeds. The solicitor makes out his bill against the company, including in it the costs of preparing the answer of the officer or manager, and there can be no doubt that they can be recovered if the action terminates in favour of the company. It appears to me that this practice, if it were allowed to be introduced, would introduce a new solicitor and a new counsel in every case, and would perpetuate the evil which existed under the old system in the Court of Chancery, when the officer or member was made an actual defendant to a bill in Chancery. I must say I much prefer leaving matters as they are, or rather as they were prior to this decision, and that no formal provision, further than has hitherto been found effectual, should be made for the payment of these costs.

I therefore think that the order of the Court below should be discharged, and the member directed to answer the interrogatories.

BAGGALLAY, L.J.:—

I am of the same opinion. Mr. *Buckley* has admitted, and I think he could hardly do otherwise than admit, that he could not support the order in the form in which it has been put by Mr. Justice *Fry*, viz., to make the filing of the answer conditional upon a previous payment of the taxed costs. Now if that be struck out, what is there to be put in its place? Various suggestions have been made, but I am by no means satisfied that any of those suggestions would do full justice to the case. I do not feel satisfied that in these cases the member who files his answer without having his costs paid beforehand would in all cases eventually get his costs. Where he acts by the solicitor of the company there would be no difficulty, but where he acts independently of that solicitor there may be some difficulty; but that, I think, is a liability to which he has exposed himself by reason of his becoming a member in a partnership of this kind. By reason of his membership he may become involved in a liability with regard to which he may not receive indemnity; but I believe

that a member of a company in giving discovery usually does get indemnified.

THESIGER, L.J.:—

I am of the same opinion. The rule upon which the question turns is nothing more nor less than an extension of section 51 of the *Common Law Procedure Act* of 1854, and is, I think, intended to be worked in the same manner in which that section was worked; and if it were so worked it would not lead to any injustice whatever. I say it is intended to be worked in the same manner, for this reason, that when one looks to the wording of rules 4 and 5, it is apparent that the examination by interrogatories which is to take place is not any examination distinct from the examination of a party to the action, but is, as was the case of the officer under the *Common Law Procedure Act*, an examination of some one who may be called upon to answer as an *alter ego* of the corporation, inasmuch as the corporation cannot itself answer. The persons to be examined are "the member or officer of such corporation," and if any objection is to be taken to those interrogatories, we find it is not an objection to be taken by the person who is actually interrogated, but is an objection to be taken by the party for whom he is called upon to answer. The 5th rule says: "Any party called upon to answer interrogatories whether by himself or by any member or officer," pointing, as it appears to me, very clearly to this, that although the member does not in one sense represent the company, yet for the purpose of being examined by interrogatories under these rules, he does represent the company. Now in practice under the *Common Law Procedure Act* the company was alone represented. The application for the administration of interrogatories was made in Chambers against the company, and if they had any objection to the interrogatories the company appeared by their solicitor, but the officer never appeared. He never had any claim to costs either before or after the interrogatories were answered by him. It was a matter entirely between the parties to the action, the corporation being one of those parties; and when the action was terminated and the costs taxed, it was the corporation, and they alone who had any claim to costs. The consequence was that all duplication of costs was avoided, whereas

C. A. 1879 BERKELEY v. STANDARD DISCOUNT COMPANY.

if we were to have these applications made either before or after the answer by a member, and Mr. *Buckley* puts an officer upon the same footing in this respect, we should have over and over again the scandal of separate solicitors appearing and separate sets of costs incurred, and such like additions to the expenses of the action.

JESSEL, M.R.:—

The order will be that the Respondent do answer as asked for in the Court below, the costs of the application to be costs in the action, and of course he will pay the costs of the appeal.

Solicitors for Plaintiff: *W. & J. Gibson.*
Solicitors for *Stirling*: *Linklater, Hackwood, & Co.*
Solicitors for Company: *Leonard Rawlins.*

C. A. 1879 C. J. B. *April* 7. C. A. *Nov.* 6.

Ex parte BURTON. *In re* TUNSTALL.

Bill of Sale, Agreement for future—Act of Bankruptcy—Assignment of Whole of Grantor's Property—Exception of Book Debts.

Shortly before a trader filed a liquidation petition he executed a bill of sale of substantially the whole of his property, to secure the repayment of an advance which had been made to him two months previously. At the time when the advance was made the borrower agreed to give a bill of sale to secure it; but the agreement was that the bill of sale was not to be signed until the lender "lost confidence" in the borrower:—

Held (reversing the decision of *Bacon*, C.J.), that this amounted to an agreement to postpone the giving of the bill of sale until the grantor should be on the verge of bankruptcy; and that, consequently, on the principle of *Ex parte Fisher* (1), it could not support the deed.

In estimating whether a bill of sale comprises the whole of a trader's property, the value of his book debts is to be taken into account.

Ex parte Foxley (2) explained.

WILLIAM TUNSTALL, a grocer at *Halifax*, on the 27th of November, 1878, executed in favour of *William Whitehead* a bill of sale of all and every his "stock-in-trade of a grocer and provision dealer, implements, utensils, shop and warehouse fixtures,

(1) Law Rep. 7 Ch. 636. (2) Law Rep. 3 Ch. 515.

fittings, goods, chattels, and personal effects," which then were, or at any time thereafter should be, in or upon the house, shop, warehouse, building, and premises occupied by him, or in or upon any other premises from time to time occupied by him, to secure to *Whitehead* the repayment of £200, with interest thereon, at the rate of 5 per cent. per annum from the date of the deed. The deed contained a recital that *Tunstall* was indebted to *Whitehead* in the sum of £200 lent by him on a promissory note dated the 30th of September, 1878, with interest thereon from that date, and that *Whitehead* having required payment of the said principal sum and interest, *Tunstall*, not being in a position to pay the same, had agreed to give the further security for the same thereinafter contained, which *Whitehead* had agreed to accept, and the deed was expressed to be made in consideration of this agreement and of the sum of £200 so lent to *Tunstall*. The deed did not state that when the money was advanced there was any agreement that a bill of sale should be given to secure its repayment. The bill of sale was registered on the 3rd of December, 1878. On the 14th of December, 1878, *Tunstall* filed a liquidation petition in the *Halifax* County Court. On the 13th of December *Whitehead* had demanded payment of the £200, and had seized the property comprised in the bill of sale. The trustee in the liquidation applied to the County Court to declare the bill of sale void as against him as an act of bankruptcy.

The trustee deposed that he believed that the bill of sale comprised the whole of the estate and effects of the debtor, with the exception of book debts and one share in a company estimated to be worth £1.

Whitehead alleged that when he advanced the £200 the debtor agreed to give him a bill of sale to secure it; but in the opinion of the Court of Appeal the result of the evidence was that the agreement was that the bill of sale was not to be signed until *Whitehead* had "lost confidence" in the debtor. Before applying to *Whitehead* the debtor had applied to a money lender for the loan, but did not like the terms proposed by him.

According to the debtor's statement of affairs submitted to his creditors, the total amount of his book debts outstanding at the date of the filing of his petition was £363, which he estimated as

C. A. 1879 *Ex parte* BURTON. *In re* TUNSTALL.

likely to produce £150. The trustee on the 6th of March, 1879, made an affidavit in which he said, "I think the amount of the debtor's valuation excessive. I have made application to each of the debtors with the following results, the application for payment being issued by me on the 29th of January, 1879; £6 1*s.* 6*d.* has been paid to me to this date; one debtor for £1 15*s.* has made an offer for payment of 2*s.* 6*d.* per month; three debtors to a total amount of £18 13*s.* 2*d.* have made offers of instalments of 4*s.* per month; one debtor for £6 1*s.* 8*d.* has made an offer of payment by instalments of 8*s.* per month. The remainder of the debtors to the number of seventy-seven have not responded to my letters of application for payment. So far as I am able to ascertain a sum of about £2 was paid to the receiver on account of the book debts. The majority of the debtors will have to be proceeded against in the County Court before payment is obtained, and all of them are working people at present in very poor circumstances, and probably could not offer more than 3*s.* to 8*s.* or 10*s.* per month, as many of the amounts owing are large, viz., from £4 to £16, and it will take years to collect them."

The Judge of the County Court declared the bill of sale to be void as against the trustee.

Whitehead appealed to the Chief Judge, and the appeal was heard on the 7th of April, 1879.

Winslow, Q.C., and *Gane*, for the Appellant:—

The bill of sale does not include the household furniture or the book debts. Moreover, it is supported by agreement at the time when the advance was made. *Ex parte Fisher* (1) is distinguishable. *In re Jackson* (2) is in our favour.

De Gex, Q.C., and *Lane*, for the trustee:—

The agreement was that the bill of sale should not be given until *Whitehead* had lost confidence in the debtor, and the principle of *Ex parte Fisher* applies. *Ex parte Cohen* (3) and *In re Gibson* (4) are also in point. All the debtor's available property was assigned to secure an antecedent debt, and the object

(1) Law Rep. 7 Ch. 636.
(2) 4 Ch. D. 682.
(3) Law Rep. 7 Ch. 20.
(4) 8 Ch. D. 230.

of the agreement was to avoid registration of the bill of sale until the debtor should be *in extremis*.

BACON, C.J.:—

This is a case of the smallest possible dimensions, and of almost unexampled simplicity. A trader, being in want of £200 to enable him to carry on his business, applies to a money lender for a loan, but not being pleased with the terms asked, he goes to Mr. *Whitehead*, a friend, and asks him to lend him the money. This *Whitehead* agrees to do upon the condition of having a bill of sale as security. That is the condition upon which the money is advanced, and where is the fraud in that? Reference has been made to *Ex parte Fisher* (1), which I think has been very much misunderstood. In that case the Lords Justices inferred that a deliberate fraud had been committed, and that the farce had been gone through of making a present advance of £100 in order that the creditor might have a bill of sale to protect an antecedent debt of much larger amount. Particular words in a judgment ought not to be stretched so as to convey a meaning different from that which the Judges intended. If, as the late Lord Justice *Mellish* said, the giving of a bill of sale were purposely postponed until the grantee is insolvent, then it would be a fraud. But here the money was to be paid down on the nail upon condition that the bill of sale should be given, and the money was in fact paid. But then it is said that the bill of sale was not to be actually executed until Mr. *Whitehead* "lost confidence" in the debtor, and Mr. *De Gex* construed that as meaning that the execution of the bill of sale was to be withheld until the debtor was absolutely insolvent. It appears to me that the evidence is all one way. In consideration of the loan the debtor contracted to give a bill of sale, and because the solicitor delayed the preparation of it, I am asked to infer that this indicated fraud and an intentional postponement so as to bring the case within that which fell from the Court in *Ex parte Fisher*. I can do no such thing. Upon the facts it is clear to me that the £200 was lent on the faith of the debtor giving a bill of sale, and the security cannot be impeached, unless I am to adopt Mr. *De Gex's* theory

(1) Law Rep. 7 Ch. 636.

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that the execution of the bill of sale was purposely postponed until the debtor was in a state of insolvency. In my opinion there is no foundation for such a contention, and the judgment of the Court below must be reversed. The Appellant must have his costs in the Court below and of the appeal.

From this decision the trustee appealed. The appeal was heard on the 6th of November, 1879.

De Gex, Q.C., and *Lane*, for the Appellant:—

An assignment of substantially the whole of the grantor's property to secure a pre-existing debt may be supported if the money was advanced upon the faith of an agreement to make the assignment: *Hutton* v. *Cruttwell* (1). But here the agreement amounted to this, that the bill of sale should not be executed until the grantee should be on the verge of bankruptcy. Such an agreement is of no avail: *Ex parte Fisher* (2).

[JAMES, L. J.:—The principle of that decision was that any promise that a creditor shall have priority in the event of bankruptcy is contrary to the policy of the bankruptcy law and void.]

Winslow, Q.C., and *Gane*, for the Respondent:—

Ex parte Fisher was very different from the present case. There the Court held that the object of the further advance was to obtain security for a previously existing unsecured debt. The transaction was a fraud on the bankruptcy law. The transaction now in question was an honest one; the money was actually advanced, and no consideration was given for it but this bill of sale. The creditors who now seek to set it aside have probably benefited by the advance. But the onus is on the trustee to shew that the deed comprised the whole of the debtor's property, and he has not done this. The book debts are not included, and they are of substantial value. Book debts must be taken into account: *Ex parte Winder* (3); *Ex parte Chester* (4); *Ex parte Field* (5).

(1) 1 E. & B. 15.
(2) Law Rep. 7 Ch. 636.
(3) 1 Ch. D. 290.
(4) Ibid. 293, n.

(5) C. A. 1879. Feb. 13.
Ex parte FIELD. *In re* MARLOW.

THIS was an appeal from a decision of the Chief Judge, that a bill of sale

[JAMES, L.J.:—That seems to be very good sense. Book debts might be the most valuable part of a man's assets, for instance, in the case of a banker.]

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was valid as against the trustee in the bankruptcy of the grantor.

The bill of sale had been given to secure an antecedent debt. The grantor was a trader, and his book debts, which he estimated to be worth £500, were not included in the assignment.

Cohen, Q.C., and *Bigham*, for the Appellant, the petitioning creditor:—

The question is whether a substantial part of the debtor's property which could be taken in execution, was excluded from the assignment. Book debts cannot be taken in execution, and *Ex parte Foxley* (Law Rep. 3 Ch. 515), is a direct authority that they ought not to be taken into consideration. It is enough to shew the creditors are delayed by the bill of sale, even if they are not defeated: *Smith* v. *Carman* (2 E. & B. 35); *Ex parte Bland* (6 D. M. & G. 757); *Lindon* v. *Sharp* (6 Man. & G. 895).

Winslow, Q.C., and *Finlay Knight*, for the holder of the bill of sale:—

The book debts formed a substantial part of the debtor's property. In *Ex parte Foxley* the Court was dealing with the proportion between the properties included in the bill of sale and the assignment of the grantor's unsecured debts.

[They were stopped by the Court.]

Assheton Cross, for the trustee.

Cohen, in reply.

[JAMES, L.J.: — Your argument amounts to this, that if a man has furniture worth £150, and book debts amounting to £5000, and his liabilities amount to £10,000, and he assigns his furniture and nothing else as security, that is an assignment of substantially the whole of his property.]

If he assigns everything that can be taken in execution his creditors must be delayed.

Another point was argued to which it is unnecessary to refer.

JAMES, L.J., was of opinion that the order of the Chief Judge must be affirmed. The question was, whether the bankrupt has assigned in substance the whole of his property, without receiving any present advance, in consideration of a past debt. Such an assignment had for generations past always been held to be an act of bankruptcy. His Lordship at first thought that *Ex parte Foxley* was an authority shewing that book debts were not to be taken into consideration in estimating the value of the property of a trader. But when the case was examined it was clear that it laid down nothing of the kind. The Judges, having regard to the amount of the property which was assigned, the amount which was reserved, and all the circumstances, considered that the debtor had made the assignment with an actual intent to defeat and delay his creditors, and in coming to that conclusion they took into consideration the value of the book debts, and they held that the taking of a new bill of sale upon an agreement not to enforce an old one did not of itself supply any new consideration for the assignment. The decision did not in any way interfere with what had been always considered to be the law applicable to such cases. Here the debtor estimated his book debts to be worth £500, and on the other side there was

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De Gex, in reply, as to the book debts:—

It is not disputed that book debts may be an important part of a man's property; the question in each case is whether they are. The test is whether there is property not comprised in the deed which would enable the debtor to carry on his business. Here the evidence shews that the book debts were not available for this purpose; they would have taken years to collect.

JAMES, L.J.:—

Upon the evidence it appears to me that we cannot dispose of this case in favour of the Respondent on the second ground. The question, therefore, is, whether on the other point the case is not governed by *Ex parte Fisher* (1). There we held that it is a fraud on the bankrupt law for a man to undertake to give his creditor a bill of sale when required, that is to say, when the circumstances of the debtor shall be such as to require the creditor to demand it. That decision established an exception upon an exception. That which is void is an assignment of all a man's property for a past consideration. But a Court of Equity regards that which has been agreed to be done as done, and therefore it has said that, if it was

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no actual evidence of their value. They formed at any rate much more than a moiety of his property, and they would have been the fund out of which in ordinary circumstances he would have paid his own debts. It seemed impossible to say that there was an assignment of anything like substantially the whole of the debtor's property.

BRAMWELL, L.J., concurred, founding his judgment mainly on the other point.

BRETT, L.J., did not agree as to the other point, but he thought it had not been proved that the deed was an act of bankruptcy. It transferred property of which the value was at the most £100. But the grantor had also book debts owing to him. Take them to have been worth only £400, still they were part of his property, and an execution creditor could have realized them. Mr. *Cohen's* argument was that you must exclude the book debts entirely from consideration, and for that proposition he relied upon *Ex parte Foxley*. But his Lordship did not think that *Ex parte Foxley* had laid down any such proposition. The Judges in that case held as a matter of fact that the book debts were not a substantial part of the debtor's property. His Lordship could not see why, either on principle or on authority, the book debts were to be excluded from consideration. The debtor, therefore, had not assigned substantially the whole of his property.

(1) Law Rep. 7 Ch. 636.

really part of the understanding when the money was advanced that a bill of sale should be given, then that agreement would be the same thing as if the bill of sale had been actually given at the time. The bill of sale would be sustained by the previous agreement. But *Ex parte Fisher* (1) established this exception upon that exception to the rule, viz., that if the bargain be not an out and out one, but only an agreement to give the bill of sale when required, then it is only a device to enable the debtor to acquire false credit, and the creditor is not entitled to avail himself of it in the event of the debtor's bankruptcy. It is a fraud on the bankrupt law. To my mind that is exactly the present case. The bill of sale was not to be signed till the borrower had "lost the confidence" of the lender. All the facts are consistent with this view, and are inconsistent with any other. Upon the evidence I come to exactly the same conclusion as the County Court Judge did. The Chief Judge seems to me not to have quite approved of *Ex parte Fisher*. But that is a decision binding upon him and upon us; and, if the case had to be decided over again, I should decide it in the same way.

BAGGALLAY, L.J.:—

I am of the same opinion. The question is whether the case is within the principle of *Ex parte Fisher*. Upon the evidence I think it clearly is. As to the other question, whether the bill of sale is an assignment of substantially the whole of the grantor's assets, it is but necessary to allude to the fact that only a few pounds have yet been realized from the book debts, and that a long time must elapse before such as can be recovered are realized.

THESIGER, L.J.:—

I am of the same opinion. The evidence satisfies me that in substance the whole of the debtor's property was included in the bill of sale. The only question is whether, at the time when the advance was made, there was such an agreement to give the bill of sale as this Court can give effect to. The debtor's evidence is

(1) Law Rep. 7 Ch. 636.

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that the bill of sale was not to be signed till *Whitehead* had "lost confidence" in him. If that evidence is not displaced it brings the case within the principle of *Ex parte Fisher* (1), which is not to be frittered away by nice distinctions, and the evidence of *Whitehead* admits something of the same kind, for he says that the bill of sale was not actually signed till he had lost confidence in the debtor.

Solicitors for Appellant: *Layton & Jacques*, agents for *J. L. Garsed, Halifax.*

Solicitors for Respondent: *Bower & Cotton*, agents for *C. H. Leeming, Halifax.*

C. A. 1879 C. J. B. *Nov.* 10. C. A. *Nov.* 12.

Ex parte LANGLEY. *Ex parte* SMITH. *In re* BISHOP.

Contempt—Breach of Injunction—Notice—Telegram—Sale under Execution—Bankruptcy of Debtor—Sheriff's Officer—Auctioneer.

Sufficient notice of the granting of an injunction may be given by telegram; but, if it is sought to commit for contempt a person who, after receiving such a notice, disregards it, the Court must decide upon the particular facts whether he had in fact notice of the injunction, and it is the duty of those who ask for the committal to prove this beyond reasonable doubt.

A person who has violated an injunction will not be committed for contempt when he swears that, though he had received notice of it by telegram, he *bonâ fide* believed that no injunction had been granted, and the circumstances shew that such a belief was not unreasonable.

It is the duty of a sheriff's officer who receives notice by telegram, purporting to be sent by solicitors in *London*, of an injunction being granted by the Court of Bankruptcy to restrain a sale in the country under an execution, to telegraph to the Court of Bankruptcy, or to the *London* agents of the sheriff, to ascertain whether an injunction has really been granted.

This, however, is not the duty of the auctioneer who is conducting the sale; he is only bound to communicate with the sheriff's officer who has instructed him to sell.

A sheriff's officer, who is not himself present at the sale, and who has no actual notice of the injunction, is not responsible for the act of his deputy who allows the sale to be continued after receiving notice by telegram.

A *London* solicitor, who obtains an order from the Court of Bankruptcy in

(1) Law Rep. 7 Ch. 636.

London restraining a sale under an execution in the country, ought, instead of telegraphing the order to the sheriff's officer, to telegraph it to a solicitor at the place, as his agent, asking him to give notice of it to the persons affected.

J. G. BISHOP was a licensed victualler, carrying on business at the *Walmer Castle Hotel, Deal,* and at another hotel in *London.* He filed a liquidation petition in the *London* Bankruptcy Court on the morning of the 6th of August, 1879.

Immediately after the filing of the petition a receiver was appointed, and on the same day at noon, upon the joint application of the receiver and the debtor, an order was made restraining, until the 8th of September, the further proceedings in several actions which had been commenced against the debtor, and (*inter alia*) restraining the sheriff of *Kent,* his officers and servants, from taking any further proceedings in an action which had been brought against the debtor by Messrs. *Wade* and *Thurston.*

Judgment for £80 had been recovered in that action, and execution had been issued, under which the sheriff of *Kent* had seized the furniture in the *Walmer Castle Hotel,* at *Deal.* The goods had been advertised for sale, and it was intended that the sale should take place on the 5th of August, but it was postponed until the 6th of August, to give the debtor an opportunity of paying the debt, which he had said that he would do. The sale was fixed to commence at 10 A.M. on the 6th of August. The sheriff's officer to whom the execution of the writ was intrusted was named *Smith,* and he lived at *Ramsgate.* He had an assistant named *Emmerson,* and a bailiff named *Hougham* had been placed in possession of the property. Mr. *M. Langley,* an auctioneer residing at *Deal,* had been instructed to carry out the sale. Early on the morning of the 6th of August *Emmerson* was at the hotel, for the purpose of making arrangements for the sale. *Smith* was unable to be present, because he had to go from *Ramsgate* to *Canterbury* at eight o'clock to transact some other business. Before eight o'clock *Emmerson* telegraphed to *Smith* asking whether the sale might be postponed to twelve o'clock. *Smith* replied by telegraph, "You may make it eleven, but not a moment later." At eleven o'clock there were not many persons present in the auction room, and the auctioneer, being of opinion that he could not then sell advantage-

C. A. 1879 *Ex parte* LANGLEY. *Ex parte* SMITH. *In re* BISHOP.

ously, further postponed the sale to twelve o'clock on his own responsibility. Soon after eleven he received a telegram from Mr. *Matthews*, the manager of the hotel, who had gone to *Ramsgate* to try and see *Smith*, as follows:—"*Smith* gone to *Canterbury*. You had better stop sale on your own account, as I know it is all right." Between eleven and twelve o'clock the auctioneer was informed by the debtor's son and by another person, that the debtor would come down by the mid-day train from *London* with the money to pay the execution debt. For this reason, and because at twelve o'clock there were not many more persons present in the room than at eleven, the auctioneer again postponed the sale to one o'clock. At one o'clock the sale began. After a few lots had been sold the following telegram was handed to *Emmerson*:—"From *Learoyd & Co.*, solicitors, *London*, to the sheriff's officer in possession, *Walmer Castle Hotel, Deal.*—Take notice, the *London* Court of Bankruptcy has made an order restraining you from selling or taking any further proceedings in the action against *Bishop*." The telegram was shewn to *Langley*, and though he was of opinion that it was merely a ruse on the part of the debtor, it was determined to stop the sale temporarily, and to telegraph to *Smith* for instructions. *Emmerson* sketched out a telegram and shewed it to *Langley*, who told him he had better send what he thought proper. *Emmerson* then left the room, and sent the following telegram to *Smith*, at *Ramsgate*:—"*Langley* just received telegram to stop sale. Shall we proceed? People are waiting your reply." *Smith* replied by the following telegram:—"If telegram to *Langley* does not state Defendant filed petition or money paid, sell at once." On the receipt of this reply the sale was continued, and all the property was sold. A copy of the restraining order was served in the evening of the same day, after the sale was over.

The trustee who was afterwards appointed in the liquidation moved to commit *Langley* and *Smith* for contempt of Court in disobeying the injunction.

Langley made an affidavit, in which he said: "I swear positively that when I saw the telegram from *London* I believed it was a trick played by the debtor or his friends for the purpose of procuring a further adjournment of the sale, and I was confirmed in that belief by the previous conduct of the debtor's son and of

Matthews, and also by the subsequent receipt of the telegram from *Smith*. I had not the slightest idea that any bankruptcy or liquidation proceedings were in contemplation, or that this Court had ordered the sale to be stopped, or that by proceeding with the sale I should be committing a contempt of this Court. Had I had any such idea I should at once have withdrawn from the place and ceased to act. I acted throughout the whole sale in perfect good faith, and at no time did I believe or even suspect that I was disobeying the order of any Court whatever."

Emmerson also swore that he did not believe that any injunction had been granted.

The motion was heard by the Chief Judge on the 10th of November, 1879.

Winslow, Q.C., and *Finlay Knight*, for the trustee, cited *In re Bryant* (1).

Creed, for the sheriff's officer, cited *Russell* v. *East Anglian Railway Company* (2).

Ambrose, Q.C., and *Bigham*, for the auctioneer, referred to *Kimpton* v. *Eve* (3).

BACON, C.J.:—

I ought not to hear a reply in a case so plain as this. It is superfluous to say, as Mr. *Ambrose* has admitted, that an order of this Court to restrain a sale under proceedings at law must be obeyed by the parties to whom it is directed. An order was made in this case; there has been no application to discharge the order; it is consequently a subsisting order; and it has been set at defiance and treated with unquestionable contempt by the auctioneer and the sheriff's officer.

The facts are not in dispute. The observation that the notice was not sufficient I cannot entertain for a moment. It is a notice by solicitors, who state that their place of business is in *London*, and if anybody wanted to know whereabouts in *London* their

(1) 4 Ch. D. 98. (2) 3 Mac. & G. 104.
(3) 2 V. & B. 349.

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office was, the nearest *Law List* at hand would have conveyed that information. The notice itself is in clear and distinct terms.

[His Lordship stated the facts, and observing on the telegram sent by *Smith* to *Emmerson*, continued:—]

Can any circumstance present a more resolute determination to defy the order of the Court than that which I have just stated? Who was the sheriff's officer that he should take upon himself to decide that the order was good for nothing, if it did not state that a petition had been filed? The auctioneer in the first instance acted like a man of sense and prudence. Having received and read the telegram, he acted upon it, and suspended the sale. Mr. *Ambrose's* argument was to induce me to believe that the auctioneer did not believe the truth of the notice. Not only did he believe in its truth, but he acted upon that belief.

The case of *Kimpton* v. *Eve* (1), therefore, has not the slightest application to this case. The auctioneer does not venture to say, except by reference to those arrangements which were in progress about the promise to pay the debt, that he had any doubt about this notice. But then he says there were some promises on the part of *Matthews*, or somebody else, to find money to pay out the execution, and then he does not say himself, but somebody else says, he believes this notice was a ruse. What attention can I pay to such a statement as that? What does it signify to me or anybody else what estimate the person who used that expression put upon this formal, regular business-like notice? I find the facts to be that, with full notice to these two gentlemen, one of whom is an officer of the law, and the other was acting under his authority, that it was unlawful for them to proceed with the sale, they defy the law, and insist upon going on.

In my opinion there is only one course that I can pursue, and that is to order these two gentlemen to be committed for their contempt, and they must pay the costs of this application.

From this decision the sheriff's officer and the auctioneer appealed. The appeal was heard on the 12th of November, 1879.

Chitty, Q.C., and *Creed*, for the sheriff's officer:—

If a notice by telegram can under any circumstances be suffi-

(1) 2 V. & B. 349.

cient, it ought to shew on its face the full address of the person from whom it purports to come, so that inquiry can be made whether it is genuine. But, at any rate, there is no case against *Smith*. He had no actual notice of the injunction; the notice given to *Emmerson*, his deputy, is not sufficient to make him liable personally for a contempt of Court. In fact, he told *Emmerson* not to sell, if the telegram stated that a petition had been filed. No doubt the authorities shew that it is not necessary that the order itself should have been actually served, if the person affected had in fact knowledge of it. But it has never been held that the maxim *respondeat superior*, or the doctrine of constructive notice, applies to such a case, except in *Rantzen* v. *Rothschild* (1), and there the only order made was for payment of costs.

Ambrose, Q.C., and *Bigham*, for the auctioneer:—

The auctioneer has positively sworn that he believed the telegram to be a trick on the part of the debtor, and that he did not believe or suspect that any order had been made by the Court, and what had previously occurred shews that that belief was not an unreasonable one. There was no wilful contempt, and no ground for a committal: *Kimpton* v. *Eve* (2). There Lord *Eldon* said that, if the party who had not been actually served with the order would go the length of saying he did not believe the order was made, he would not hold him guilty of a contempt in disobeying it. If the telegram had been a mere ruse, and the sale had been stopped, how would the sheriff and the auctioneer be protected if any damage had resulted to the execution creditor from the delay? It has never been held that a simple notice by telegram is sufficient.

[THESIGER, L.J.:—In *Heywood* v. *Wait* (3) Vice-Chancellor *Malins* referred to such a case.]

In *Heywood* v. *Wait* the person was present in Court when the order was made. In *In re Bryant* (4), which may be relied on against us, the Chief Judge found as a fact that the sheriff's officer and the auctioneer knew that a liquidation petition had

(1) 14 W. R. 96.
(2) 2 V. & B. 349, 352.
(3) 18 W. R. 205.
(4) 4 Ch. D. 98.

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been filed, and that an injunction had been granted, and yet no order for committal was made; the only order was for payment of costs.

Winslow, Q.C., and *Finlay Knight*, for the trustee in the bankruptcy:—

The notice given by the telegram was clear and distinct. It was not necessary to state that the injunction was founded on the filing of a bankruptcy or liquidation petition. Even a bad order must be obeyed until it is set aside: *Russell* v. *East Anglian Railway Company* (1). The argument that a telegram might be sent by any one under any name would apply equally to a letter. A person who received notice of an injunction by a letter could swear that he believed it to be a forgery. Notice in writing of an injunction has been held to be sufficient.

[JAMES, L.J.:—Has a notice by letter ever been held sufficient?]

If the auctioneer and *Emmerson* thought the telegram a ruse, why did they stop the sale and telegraph to *Smith* for instructions? That is inconsistent with what they say. Any order of the Court may be disobeyed with impunity, if the person affected by it can bring his conscience up to the point of swearing that he did not believe the notice of it to be true: *Van Sandau* v. *Rose* (2). *Langley* or *Emmerson* ought to have telegraphed to the Bankruptcy Court, or to the sheriff's agents in *London*, to inquire whether the order had really been made. *Smith* cannot escape from liability because he chose to be out of the way, and allowed his business to be transacted by a subordinate.

[JAMES, L.J.:—The sheriff himself might as well be committed.]

Rantzen v. *Rothschild* (3) has not been overruled.

JAMES, L.J.:—

I think the order of the Chief Judge cannot be sustained. With regard to the sheriff's officer, he does not seem to have been a party to the alleged contempt at all, because I do not think the mere fact of the telegram is sufficient to bring home to him any

(1) 3 Mac. & G. 104. (2) 2 Jac. & W. 264.
(3) 14 W. R. 96.

participation in the supposed contempt. You start with this, that really the persons who are putting the order into force created the difficulty. So far as appears, up to the day before the 6th of August, there had been no notion of filing a liquidation petition. Then on the 6th there was a telegram from a Mr. *Matthews*, who is evidently connected with the debtor, of which no explanation has been given, saying "Stop the sale; it is all right," which can only mean this, that the matter had been settled, that is, that the debtor had found means to satisfy the execution.

Then it is sworn by three persons that statements were also made to the auctioneer and to the sheriff's man in possession that the debtor was coming down by the twelve o'clock train for the purpose of paying out the execution. Therefore there were circumstances which would naturally induce a man to be suspicious, and the sheriff's man who was there actually says he did not believe that any order for an injunction had been made, while, with regard to Mr. *Smith*, he does not seem to me to have had anything brought to his knowledge sufficient to shew that he was personally guilty of any contempt of Court. I do not see where you are to stop. If *Smith* who was not there, who was not served with any order, to whom the telegram was not even addressed (it was addressed to the sheriff's officer in possession), if he, being away from the place at the time, not being away for the purpose of absenting himself so as not to receive any notice, but being away *bonâ fide* for the purpose of discharging his own other functions, if he is to be committed for something which was done by the auctioneer and the man in actual possession, I do not see why we should stop short of committing the under-sheriff, or even the high sheriff himself. I do not think the cases justify us in going to that extent, and that is what the case amounts to so far as the sheriff's officer is concerned.

Then, with regard to the auctioneer, something more may perhaps be said against him. It appears to me that he might have taken some steps (though I do not know what steps I should have taken if I had been in his position) to ascertain whether an order had really been made by the Court. Perhaps some auctioneers would have done so. But he has taken upon himself to swear positively (and he has not been cross-examined) that

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which Lord *Eldon*, in *Kimpton* v. *Eve* (1), held to be sufficient. He swears that he did not believe that there had been any proceedings whatever in the Bankruptcy Court, or that any such order had been made. A person in such a position, and a sheriff's officer is placed in great difficulty upon receiving a telegram of this kind, knowing nothing at all of the person who may have gone to the post-office and sent it; a telegram which might just as well have been sent by the debtor or by *Matthews*, or anyone else on behalf of the debtor, in the name of Messrs. *Learoyd*. I am very far from saying that notice of an order cannot be given by telegram. But it is very difficult to commit for contempt where a man says that which the auctioneer does here, under circumstances which certainly give colour to his assertion, and there is some amount of probability that he may, having regard to what had already taken place that day, not have believed that any order had been made by the Court, and have had no suspicion whatever that he was disobeying any order of the Court when he continued the sale.

I think we cannot in the face of his affidavit charge him with contempt. And I must say that the difficulty was brought about by the persons who obtained the order. If it was intended to be enforced, why was it not obtained the day before? Why was not the petition filed the day before? Why did they not get the order in time to send down a solicitor or a solicitor's clerk with it, or with some sufficient evidence that it had been made? They could have done this if they had been minded to take reasonable steps for the purpose, and I believe it was their conduct which led to the whole of this difficulty by leaving the thing to the last moment, and then merely trusting to a telegram to give notice of an order which was in fact only pronounced after the sale had been begun, which sale would probably have been over had it not been for the delays which had been already granted, and of which the person who sent the telegram could have had no knowledge.

THESIGER, L.J.:—

I agree that the appeal must be allowed. But, in holding that

(1) 2 V. & B. 349.

the order of the Chief Judge cannot be supported, I in no way dissent from the proposition laid down by him in this case, and also in *In re Bryant* (1), that, under certain circumstances, a telegram may constitute such a notice of an order of a Court as to make a person who disregards the notice and acts in contravention of the order, liable for the consequences of a contempt of Court. I think it would be most disastrous to the interests of public justice that the means of communication afforded by the telegraph should not be made use of for such a purpose, especially in cases like the present. But the question in each case, and depending upon the particular circumstances of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which had been made? And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.

Has that burden been discharged in the present case? First, take the case of the sheriff's officer. He had, in accordance with his instructions and his duty, ordered a sale to take place through the medium of his officers, and in the middle of the day upon which the sale was fixed to take place he received this telegram from his deputy *Emmerson*: "*Langley*" (that is, the auctioneer) "just received telegram to stop sale. Shall we proceed? People are waiting your reply." Now it must be borne in mind that the man who received that telegram was aware that there had been attempts on the part of the debtor to delay the sale, with the view, if possible, of paying out the execution, and it is clear that there had been discussions and communications which might lead the sheriff's officer *Smith bonâ fide* to believe that the execution might upon that day be paid out. There is nothing, so far as I can judge from this telegram, to shew that the sheriff's officer receiving it did not *bonâ fide* believe, not necessarily that the telegram which had been received by *Emmerson* was a ruse of the debtor, but that, at all events, it was a communication from the debtor for the purpose of obtaining further delay. There is nothing to shew that the telegram which he received in any way

(1) 4 Ch. D. 98.

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communicated to the mind of the sheriff's officer that there had been proceedings in bankruptcy and a restraining order founded upon those proceedings.

But, more than that, I think that when Mr. *Smith's* own telegram is looked at it is obvious that he believed that there were no bankruptcy proceedings, and had no thought that there were any. Still less did he think that there was any order founded upon such proceedings. There was nothing to shew him that any act of bankruptcy had been committed by the debtor, or any petition filed, and consequently there was nothing to shew him that there had been any restraining order. So far it appears that the sheriff's officer was only acting in accordance with the duty which he owed to the execution creditor. Therefore no case is made against him. But, in saying that, I wish to guard myself from being supposed in any way to dissent from what Mr. *Winslow* has said with regard to the duties of a sheriff's officer. I think that, if Mr. *Smith* had had notice by telegram that there were proceedings in bankruptcy, still more if he had had notice that a restraining order had been made, and the telegram had purported to come from Messrs. *Learoyd*, solicitors, of *London*, it would have been his duty to communicate, either with the Bankruptcy Court or with the sheriff's agents in *London*, for the purpose of finding out whether the telegram was correct. But *Smith* had no notice of any proceeding—he had no notice of any order.

That being the case with regard to the sheriff's officer, what is the position of the auctioneer? Now here again it must be borne in mind that there had been, not only before the 6th of August, but upon that day, communications made to the auctioneer for the purpose of obtaining a delay in the carrying out of the sale. A telegram had been received between ten and eleven o'clock, the contents of which had been communicated to him, and which, I certainly think, he was justified in holding to be a ruse for the purpose of obtaining delay.

Then the next proceeding was the telegram which undoubtedly purported to come from some solicitors in *London*, and stated that a restraining order had been obtained. What was the duty of the auctioneer under such circumstances? I do not think that it was his duty to communicate either with the Bankruptcy Court or

with the sheriff's agents in *London*, but I do think it was his duty (and he fulfilled that duty) to communicate with the person under whose instructions he was selling. He did so, and he received instructions from him to proceed with the sale, unless a petition had been filed by the Defendant. It is said, "Well, but, looking at the nature of the telegram, he must have been aware that a petition had been filed," and I agree that the circumstances are somewhat suspicious as regards the auctioneer. But, on the other hand, he has positively sworn that, coupling what had happened before with the telegram, he *bonâ fide* believed that he was not bound to act upon the telegram which he had received, and that there had been no proceedings which would justify him in stopping the sale. He has not been cross-examined, and nothing has been proved to shew that his affidavit is not true. Under such circumstances the observations of Lord *Eldon*, in *Kimpton* v. *Eve* (1), seem to me pertinent and material, and I may add that in a case like the present the benefit of any doubt ought to be given to the person charged with contempt.

There is another observation which I ought to have made with reference to the sheriff's officer. It is said that, assuming that he had not actual notice of the proceedings and the order, at all events he had notice through his agent. I am aware that under certain circumstances, at all events before *Lord Campbell's Act*, proprietors of newspapers were responsible criminally, and subject to be imprisoned for acts which they had not personally committed, but which had been perpetrated by their agents—I mean, of course, for libels inserted in their newspapers. But that liability was founded upon the idea that the proprietor who employs an agent for the purpose of publishing a newspaper, and from day to day putting certain articles into it, gives a general authority to that agent to publish that which upon any particular day is published in the paper. But the present case stands upon a very different footing. What happens is, not that the agent is doing something which is within the general scope of his duty, but that, while he was performing what he was authorized by his principal to perform, something occurs which places him and his principal in a perfectly different position, and one which necessitates entirely new instructions.

(1) 2 V. & B. 349.

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Under these circumstances it appears to me that it would be the height of injustice to say that, although no communication was made to the principal, although there was nothing to shew him that these particular circumstances had arisen in the course of the sale, he is to be held responsible as if he had personally committed a contempt of Court.

JAMES, L.J.:—

I wish to add this, that when parties who obtain an injunction wish to communicate it by telegram, there is a very obvious mode by which they can prevent difficulties like this. If the solicitor, instead of telegraphing to the sheriff's officer, were to telegraph to some solicitor as his agent at the place, and tell him to go and give notice of the order, then the person affected would have the responsibility of an officer of the Court for what he was doing.

The sheriff's officer will have his costs in both Courts.

The auctioneer must pay his own costs.

Solicitors for Sheriff's Officer: *Church, Sons, & Clarke,* agents for *Mercer, Ramsgate.*

Solicitors for Auctioneer: *Bower & Cotton,* agents for *Mowll, Dover.*

Solicitors for Trustee: *Learoyd, Learoyd, & Peace.*

LEEMING *v.* LADY MURRAY.

M. R.
1879
March 13.

[1878 L. 238.]

Trustee in Bankruptcy—Power to sue—Power to compromise Actions—Consent of Committee of Inspection—Bankruptcy Act, 1869, *ss.* 22, 25, 27, 83, *sub-s.* 7.

A trustee in bankruptcy or liquidation, having power to sue either in his own name, or in his official name under sect. 83, sub-sect. 7, of the *Bankruptcy Act*, 1869, possesses all the rights of an ordinary litigant, including a power to compromise an action instituted by him, as, for instance, by consenting to an order being made in the action giving him less than he originally claimed: for the 27th section, as to the trustee's general power to compromise with the sanction of the committee of inspection, does not control or affect his right to compromise actions which he has instituted in his capacity of trustee.

DEMURRER to statement of claim.

The statement of claim alleged as follows:—

On the 26th of January, 1869, one *Blake* effected a policy on his life with the *Clerical, Medical, and General Life Assurance Society* for £1500, and he subsequently charged the policy in favour of the society as security for a loan, but no assignment was made of the policy. In November, 1874, *Blake* went into liquidation by arrangement under the 125th section of the *Bankruptcy Act*, 1869, one *Coker* being appointed the trustee, and a committee of inspection being also appointed. On the 14th of January, 1876, *Blake* died, whereupon the £1500 became payable to *Coker* as trustee, subject only to a small deduction in respect of the loan from the society. On *Coker* applying for the sum due in respect of the policy, a claim was made by the Defendant, Lady *Murray*, to have £950 out of the policy-moneys, such claim being made by her under an alleged mortgage to her for that amount from *Blake* dated in 1875. At the date of such mortgage the Defendant was well aware of *Blake's* liquidation proceedings, and that the benefit of the policy was vested in the trustee thereunder. In 1877 *Coker* brought an action against the insurance society and the Defendant, Lady *Murray*, claiming payment of the amount due from the society under the policy, and in the course

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of such action *Coker* came to an arrangement with the Defendants in such action which is mentioned in the order hereinafter stated.

Accordingly, by an order made in that action on the 22nd of March, 1877, it was by consent ordered that the Defendants, the insurance society, should be at liberty, out of the sum of £1446 3*s.* 2*d.* admitted to be due from them in respect of the policy, to retain the sum of £3 3*s.* for the costs of the action, and to pay £1443 0*s.* 2*d.* cash, the balance thereof, into Court to the credit of the action; and it was, by consent of the Plaintiff and the Defendant Lady *Murray*, ordered that out of the said £1443 0*s.* 2*d.* cash, when paid into Court as aforesaid, the sum of £806 6*s.* should be paid to the Defendant in respect of her claim on the moneys due on the policy and her costs of the action.

The society subsequently paid into Court to the credit of the said action the said sum of £1443 0*s.* 2*d.* cash, and the said sum of £806 6*s.* was subsequently paid out of such sum to the Defendant in pursuance of the said order.

The Plaintiff in the present action, who, upon the resignation of *Coker*, was appointed trustee under the liquidation, maintained that *Coker* had no authority to make such arrangement and consent to such order on behalf of the creditors: that neither the consent of the committee of inspection nor of the Court of Bankruptcy was obtained to make such arrangement or consent to such order, and that such order was consequently not binding upon the Plaintiff.

The Defendant, Lady *Murray*, however, insisted on her right to retain the £806 6*s.*, whereupon the trustee brought this action, claiming to have it declared that the mortgage of 1875 was void as against him and the creditors under the liquidation; that the £806 6*s.* paid to the Defendant formed part of the assets of *Blake*, to be administered under his liquidation for the benefit of his creditors, and payment thereof to the Plaintiff accordingly; and general relief.

The Plaintiff sued in his own name, and not by his official name as trustee, as provided by sect. 22 and sect. 83, sub-sect. 7, of the *Bankruptcy Act*, 1869.

The Defendant demurred to the statement of claim on the ground that the consent order of the 22nd of March, 1877, was

binding upon the trustee in liquidation for the time being, and upon the creditors, and further that the Plaintiff was not entitled to sue the Defendant in respect of the matters complained of otherwise than in his official name and capacity.

The demurrer now came on for argument.

Davey, Q.C., and *Fellows*, for the demurrer:—

The Plaintiff will rely on sect. 27 of the *Bankruptcy Act*, 1869, which says that the trustee may "compromise" with creditors "with the sanction of the committee of inspection" (1). That section, however, does not say that the trustee must obtain the sanction of the committee before commencing an action. He has a power to sue given to him by sect. 83, sub-sect. 7, and that power implies a power to compromise the action; in fact confers upon him all the ordinary rights of a litigant, and these rights are not subject to the control of the committee of inspection. Under the old law, the assignees of a bankrupt or insolvent were not bound to obtain the consent of the Court or the creditors before commencing an action; the responsibility of the proceedings being thrown solely upon the assignees: *Piercy* v. *Roberts* (2); *Casborne* v. *Barsham* (3); *Lee* v. *Sangster* (4): and we submit that the same rule applies now in the case of a trustee under the Act of 1869. The bankrupt's property having become vested in the

(1) Sect. 27, so far as is material, is as follows:—

"The trustee may, with the sanction of the committee of inspection, do all or any of the following things:

"1. Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts.

"2. Refer any dispute to arbitration, compromise all debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any debtor or person who may have incurred any liability to the bankrupt, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon:

"3. Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors in respect of any debts proveable under the bankruptcy:

"4. Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person."

(2) 1 My. & K. 4.

(3) 6 Sim. 317.

(4) 2 C. B. (N.S.) 1. 3 Jur. N.S. 444

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trustee, he can deal with it without any order of the Court: *Sturgis* v. *Evans* (1).

In *Ex parte Wyld* (2), Lord Justice *Turner* said that an award on a reference to arbitration by the assignees of a bankrupt without the leave of the Court could not bind the estate of the bankrupt nor the commissioner. That, however, is only a *dictum*, and in that case no action had been brought by the assignees. Moreover, we say that the present action is wrong in form: according to sect. 22 of the Act it should have been brought in the official name of the trustee, whereas he is suing in his own name only.

They were stopped by the Court.

Roxburgh, Q.C., and *C. H. Turner*, for the Plaintiff:—

We submit that the consent of the committee of inspection was essential to the validity of the compromise. The object of the *Bankruptcy Act*, 1869, was to afford a greater protection to creditors than had previously existed, and therefore the Act carefully limits and controls the powers of the trustee in dealing with the bankrupt's estate, by directing that every compromise must obtain the sanction of the committee of inspection as representing the creditors. Without such sanction, therefore, the trustee in the present case had no power to compromise the Defendant's claim, or to consent to an order in the action, an order by consent being merely equivalent to an agreement between the parties.

[JESSEL, M.R.:—But this is an order of the Court, and therefore binding as such.]

It is, no doubt, in form, an order of the Court, but it is an order made in pursuance of an agreement between the trustee and a creditor for a compromise, which could only be carried out with the sanction of the committee under the 27th section. The trustee may be nonsuited in an action, but he cannot compromise it without consent. If a trustee can bring an action and then compromise it by a consent order to the injury of the creditors, and the general body of creditors cannot get rid of that order, there is a serious defect in the Act. The authorities cited by the other side are

(1) 2 H. & C. 964. (2) 2 D. F. & J. 642.

under the old law and should be disregarded. Should it be necessary to discharge the consent order, that may be done under the claim for general relief.

We also submit that the mortgage to the Defendant was void as against creditors, it having been executed pending the bankruptcy.

With regard to the form of this action, by our suing in our own name instead of as trustee of the bankrupt, we give the Defendant the advantage of our personal liability for the costs of the action, which she would not otherwise possess. But at most this is a mere technicality, which may be set right by amendment.

JESSEL, M.R. :—

I am of opinion that this demurrer must be allowed.

The question intended to be raised by this demurrer is a very serious one, but it is not raised by the pleadings as they stand. The question intended to be raised is this, that if a trustee in bankruptcy brings an action, and an order is made in that action by his consent, the order is void unless the sanction of the committee of inspection has been obtained to his consenting to the order or unless the order gives him all he can possibly claim.

Now the 27th section of the *Bankruptcy Act*, 1869, says this :— [His Lordship read the section, and continued :—] The whole question which this section is supposed to solve is whether a trustee who has brought an action relative to the bankrupt's estate may compromise it without the sanction of the committee. What then is the power conferred by this section? It is a power for the trustee to do certain things so as to bind the creditors of the bankrupt, and the creditors only. If, in the present case, this had been a compromise out of Court, it seems clear that a person taking under the compromise would not be entitled to say that the trustee made it without the consent of the committee. Then the 83rd section says (sub-sect. 7) that "the trustee of a bankrupt may sue and be sued by the official name of 'the trustee of the property of a bankrupt,' inserting the name of the bankrupt." Now I will assume for the present purpose that he may sue in his own name: he may sue certainly in his official name. The 17th section vests the property of the bankrupt in the trustee; and when there is no negative clause the rights by law follow the

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vesting. Now the 83rd section is not negative: the right conferred by it is not a part of the whole of the right conferred by the law, but an additional right not known to the law and given by this section for the first time: it does not import a negative. It is therefore clear that a trustee may sue in his own name as owner. But the section shews that he may institute proceedings without the consent of the committee. Therefore he may initiate litigation without the consent of the committee: that is important. Under the old law he had no power to do this in his own name: now he has. If he has power to bring actions he has power to conduct actions, and therefore he has all the powers of an ordinary litigant: that is to say, he can take all such steps in an action as an ordinary litigant can take, such as consenting to orders being made in the action.

Again, the trustee is the agent for the creditors; and the Court never went behind agents conducting actions, behind counsel and solicitors for instance: the agent has complete control over the proceedings, and it would be impossible to conduct an action in any other way, for some unexpected incident may arise in the course of the action which necessitates his immediate decision. Full power of control is in fact absolutely necessary to an agent in the conduct of an action: otherwise the interests of his principal might be seriously imperilled.

Therefore it seems to me that this 27th section, as to the trustee's power to compromise, is not intended to control the right of the trustee to compromise actions which he has power to institute. When, then, you find a trustee in bankruptcy with power conferred upon him by Act of Parliament to bring actions, you must suppose that the Legislature intended to give him the ordinary power to conduct actions.

Now in the present case a claim was made by the Defendant as mortgagee against a sum of £1500 payable to the trustee of the bankrupt under a policy. The Plaintiff does not say there was no other claim against the fund, so that there may have been other claims. Then the Plaintiff says the Defendant, when she took her assignment, was aware of the liquidation proceedings and of the benefit of the policy being vested in the trustee.

The trustee brought an action for the recovery of the policy-

money, but for some reason or other he *bonâ fide*—for no collusion or fraud is alleged—agreed to allow the claimant a certain sum in discharge of her claim. As I have said, I do not know for what reason he did so, but for some reason or other the trustee consented *bonâ fide* that the claim should be allowed, and accordingly by an order of the Court dated the 22nd of March, 1877, it was by consent ordered that the sum of £806 6*s*. should be paid to the claimant in respect of her claim and costs. That order was, I take it, binding on the trustee, *Coker*, and his successors in office. It is an order of the Court made on consent; not the less an order because made on consent. By that order it was decided that the money should be paid in a certain way, and no one objected. If the present Plaintiff is right the Court ought not to have ordered the money to be so paid: it is then an adverse order. If the trustee was incompetent to consent, the payment was left to the order of the Court without any consent, and then it was simply an order of the Court made without consent. If the order is void, it is void altogether, and there is no protection whatever to the insurance company, and the present Plaintiff has the right to recover from them the whole amount claimed. The whole fund was paid, not by the Plaintiff, but by the insurance company, into Court.

Therefore the Plaintiff is on the horns of a dilemma: the order is either binding on him or it is not. If it is binding upon him, it is as *Coker's* successor, and he can be in no better position than his predecessor. If, on the other hand, it is not binding on him, then he may seek to recover the amount from the insurance company; but he cannot do so by this action, for the company is not a party to it. When an order has once been made by a Court of competent jurisdiction you cannot treat that order as a nullity: if you want to get rid of the order, you must move to discharge it: but that cannot be done in this action, because the insurance company is not a party.

I am of opinion that this action fails altogether, and therefore the demurrer must be allowed. As the Plaintiff is wrong both in form and substance, I shall not give him leave to amend.

Solicitor for Plaintiff: *A. E. Copp.*
Solicitors for Defendant: *Jull & Rogers.*

M. R.

1879

July 18.

In re TURNER AND SKELTON.

[1879 T. 44.]

Vendor and Purchaser—Misdescription—Conditions of Sale—Compensation after Conveyance.

Where in an agreement for the sale of land the conditions provided that if any error or misstatement should be found it should not annul the sale, but that compensation should be made in respect thereof, and an error in the quantity of the land was discovered after the conveyance had been executed:—*Held*, that the purchaser was entitled to compensation.

Manson v. *Thacker* (1) not followed.

THIS was a motion on behalf of the vendors of certain property to discharge an order made in Chambers, on the application of the purchaser, awarding him compensation for an admitted difference in the quantity of the land between the description in the agreement for sale and the actual measurement.

By the agreement for the purchase the vendors agreed to sell, and the purchaser to buy, a piece of land, described in the schedule to the agreement as containing 6A. 2R. 10P., or thereabouts, for £500. And by the conditions annexed to the agreement it was provided that if any error or misstatement should be found in the schedule it should not annul the sale, but compensation should be made in respect thereof, the amount of such compensation to be ascertained by two indifferent persons, and in case of their disagreement, by their umpire; and that if either party should fail to appoint a referee ten days after notice, the referee of the other party should make the decision alone.

After the purchase had been completed and the conveyance executed, the purchaser discovered by measurement of the piece of land that it only contained 5A. 0R. 7P. Accordingly he served a notice on the vendors that he had appointed a referee to ascertain the amount of compensation to be paid to him in respect of the error of description. The vendors having neglected to appoint a referee, the purchaser's referee awarded that they should pay him the sum of £108 by way of compensation. This the vendors declined to pay.

(1) 7 Ch. D. 620.

The purchaser thereupon took out a summons under the *Vendor and Purchaser Act*, 1874, which was heard before the Judge in Chambers, and it was declared that he was entitled to the sum of £108 for compensation, and that the same should be paid by the vendors.

The vendors now moved to discharge the order.

Davey, Q.C., and *Edward Walker*, in support of the motion:—

We admit the misdescription in the quantity of the land, but the question is whether the purchaser can avail himself of the condition in the contract after the conveyance has been executed. That condition provided that if any error or misstatement should be found, it should not annul the sale, but that compensation should be made in respect thereof. We submit that this condition contemplates the case of a misdescription discovered before conveyance, but that after the purchaser has accepted the conveyance the condition is merged in the conveyance: *Legge* v. *Croker* (1).

The case of *Bos* v. *Helsham* (2) may be relied on by the purchaser, but that case has never been followed, and stands alone. In *Manson* v. *Thacker* (3) Vice-Chancellor *Malins* held that a purchaser could not, in the absence of fraud, obtain compensation after conveyance for a misrepresentation, even though such misrepresentation related to the subject-matter of the conveyance. In *Besley* v. *Besley* (4) the same Vice-Chancellor refused to allow a claim for compensation by an underlessee where an underlease had been granted for a longer term than the lessee had power to give, it being a case of mutual mistake not discovered till long afterwards.

The case of *Cann* v. *Cann* (5) appears at first sight against the vendors, but that case is distinguishable, because there the purchaser applied to be recouped all the purchase-money which was still in the hands of the Court.

In this case the condition, so far as it relates to compensation, goes on the general doctrines of equity, which would be part of the contract itself, unless it were otherwise expressly provided,

(1) 1 Ball & Bea. 506.
(2) Law Rep. 2 Ex. 72.
(3) 7 Ch. D. 620.
(4) 9 Ch. D. 103.
(5) 3 Sim. 447.

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and under these no compensation could be claimed after conveyance.

Chitty, Q.C., and *Massey*, for the purchaser, were not called on.

JESSEL, M.R.:—

This case is of importance because of the different views taken by the Judges; otherwise I should say the law was settled.

I will first consider what the law is where there is no special contract between the vendor and purchaser as to compensation. There are, no doubt, cases in which a purchaser may lose his right to compensation by doing certain acts which shew an intention on his part to fulfil the contract and to waive any claim in respect of misdescription of the property.

The law is thus stated in *Dart* on the Law of Vendors and Purchasers (1): "A purchaser will lose his right to resist specific performance and his right to compensation or abatement on the ground of . . . a variation from the description in the particulars if, at the time of entering into the contract, he had, or by using due diligence might have had, knowledge of the defect; or if, after having become acquainted with it, he, without insisting thereon, proceed in the treaty; or, *à fortiori*, take possession." So the way he puts it is that, if the purchaser knows of the variation when he enters into the contract, he cannot get compensation, or if he goes on with the contract after becoming acquainted with it, he cannot get compensation; but he does not state that a purchaser loses his right to compensation because, without knowing of it, he has taken a conveyance of the property.

Again the same writer states (2)—and I read these passages from a text book as shewing the view taken of the law by the profession—"A purchaser after conveyance has been allowed compensation out of his purchase-money on the ground of the rent of the estate having been misstated in the particulars: *Cann* v. *Cann* (3), or the length of an outstanding term: *Horner* v. *Williams* (4). But of course this would not be allowed if he purchased with

(1) 5th Ed. p. 1077.
(2) Page 1225.
(3) 3 Sim. 447.
(4) 1 Jones & Carey, 274.

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notice of the error. When he claims compensation, he should apply by summons to have it either paid, or deducted from his purchase-money. Under special circumstances he has been allowed to pay the purchase-money into Court and take possession without prejudice to his claim for compensation."

No book can be produced to shew that it was thought to be settled law that a purchaser loses his right to compensation by taking a conveyance, and on what principle should he do so? The theory is that he has contracted to take compensation if there is any variation from the particulars. Why, then, should he lose it by taking a conveyance? The only reason that can be alleged is that everything is supposed to be settled between the parties, but why should that be an obstacle to the right of the purchaser when the defect is discovered afterwards? In this very case the defect is one of measurement, which the purchaser has discovered after the conveyance, and which he could only have discovered by the leave of the vendor. In such a case the purchaser can only investigate the state of the property before completion by permission of the vendor, which permission the vendor is not bound to give. When the mistake is one which a purchaser could not by due diligence discover, why should he be held not to be entitled to compensation?

As to the authorities on the subject, they are all, with one exception, the other way. First, there is *Cann* v. *Cann* (1). If there had been any such rule as that now contended for by the vendors, it would doubtless have been urged by Mr. *Knight*, afterwards Lord Justice *Knight Bruce*, who appears to have been the leading counsel for the vendors. In that case one of the conditions provided that if there should appear any error or mistake in the description, or admeasurement of the estate in the particular . . . such error or mistake should not annul the sale, but a compensation or equivalent should be given or taken." That case is undistinguishable from the present case, except that here the condition goes on to provide that the amount of the compensation shall be determined by two indifferent persons or their umpire, and that, if either party fail to appoint a referee ten days after notice, the referee of the other party shall make the decision alone.

(1) 3 Sim. 447.

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The Vice-Chancellor says (1): "The question is whether, there having been a misrepresentation as to the value of the property, in respect of which the purchaser had a right of action, the circumstance of his having taken a conveyance has destroyed the right. Now it appears to me that the right of the Petitioner in that respect is not at all affected by that circumstance."

That is an express decision that the purchaser's right is not taken away by his having taken a conveyance, and I consider it a binding authority unless overruled by some subsequent decision.

In 1866 a similar case came before the Court of Exchequer in *Bos* v. *Helsham* (2). There the error was not in the measurement but in the rental, and it was held that it was a proper subject of compensation within the meaning of the condition, and that the fact of the conveyance having been executed made no difference. Chief Baron *Kelly* observed, referring to the condition (3): "No distinction is made, though it would have been easy to make it between an error or mistake discovered *before* and one discovered *after* the execution of the conveyance."

With these authorities one would think that the law would be considered as settled, but Vice-Chancellor *Malins* has, in *Manson* v. *Thacker* (4), decided the other way. In that case the contract was undistinguishable from those in the former cases. The Vice-Chancellor observed (5): "The purchaser here has had ample opportunity of examining the property, for there was no concealment, and he ought to have discovered this defect before he completed the purchase." He goes on to say that if the Court will not relieve a purchaser when the whole estate is lost, it surely will not give compensation for a defect. He adds: "It is true there is some doubt arising from the case of *Cann* v. *Cann* (6), decided by Vice-Chancellor *Shadwell*, a very experienced and able lawyer; but that case, in my opinion, can only be supported on the ground that the representation, which turned out to be untrue, ought never to have been made by the vendor, and amounted in the view of the Court to a species of fraudulent misrepresentation. In *Bos* v. *Helsham* the Court decided that a misrepresentation as to rental

(1) 3 Sim. 449.
(2) Law Rep. 2 Ex. 72.
(3) Ibid. 77.
(4) 7 Ch. D. 620.
(5) Ibid. 623.
(6) 3 Sim. 447.

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was a proper subject of compensation, though not discovered till after the execution of the conveyance. But there, also, the vendor was, in the opinion of the Court, guilty of a fraud." That, however, is not my view of the case.

Considering, then, the judgment in *Cann* v. *Cann* (1), and the subsequent case of *Bos* v. *Helsham* (2), I should consider myself bound by authority, and I cannot imagine that Vice-Chancellor *Malins* intended to overrule the previous cases.

Looking at the language of the condition in the present case, can it be said that the purchaser by taking the conveyance has in any way waived the condition? There may, indeed, be cases in which the conditions of a contract are waived by taking a conveyance, but such cases have no application to such a contract as the present, and the more I examine it the more I am convinced that the decision in Chambers was right, and that the summons must be dismissed with costs.

Solicitors: *Crowder, Anstie, & Vizard*, agents for *N. Creswick, Sheffield; F. Brooke*, agent for *J. J. Wheat, Sheffield.*

In re HARFORD'S TRUSTS.

M. R.
1879
Nov. 8.

Trustee Act, 1850, *s.* 32—"*New*" *Trustees—Appointment of continuing Trustees in place of themselves and an absconded Trustee.*

One of the four trustees of a will having absconded, *Held*, that the Court had jurisdiction under s. 32 of the *Trustee Act*, 1850, to appoint the remaining three as sole trustees in place of themselves and the fourth.

In re Stokes' Trusts (3) followed.

ONE of the four trustees of a will having absconded, a petition was presented praying that the three remaining trustees "might be appointed trustees of the said will in the place of the said" four trustees, naming them; and for a vesting order.

Under the trusts of the will, the testator's real and personal estate belonged to his daughter absolutely, subject only to an

(1) 3 Sim. 447. (2) Law Rep. 2 Ex. 72.
(3) Law Rep. 13 Eq. 333.

M. R. 1879 *In re* HARFORD'S TRUSTS.

annuity to the mother. The Petitioners were the mother and daughter, and the trustees of the daughter's marriage settlement.

G. I. Foster Cooke, for the Petitioners:—

[JESSEL, M.R.:—Has the Court jurisdiction to appoint persons trustees who are trustees already? The 32nd section of the *Trustee Act*, 1850, says that the trustees to be appointed are to be "new" trustees.]

In *In re Stokes' Trusts* (1) Lord *Romilly* held that an appointment in the form now prayed was within the section.

[*In re Dalgleish's Settlement* (2) was also referred to.]

Millar, for the three trustees.

JESSEL, M.R.:—

It appears that Lord *Romilly*, in *In re Stokes' Trusts*, made the order after full consideration; I will therefore make an order as prayed.

Solicitors: *Gregory, Rowcliffes, & Rawle*, agents for *Isaac Cooke & Sons, Bristol.*

M. R. 1879 *Aug.* 6.

In re SUMMERS. BOSWELL *v.* GURNEY.

[1876 S. 195.]

Practice—Creditor—Administration—Insolvent Estate—Interest on Debt—Judicature Act, 1875, *s.* 10.

In an action for the administration of the estate of a person who has died insolvent since the commencement of the *Judicature Act*, 1875, a creditor on the estate whose debt bears interest is not entitled to interest up to the day of payment, but only to the date of the judgment for administration, which, by virtue of the 10th section of the Act, is equivalent to an adjudication in bankruptcy.

THIS was a creditor's action for the administration of the estate of *Edmund Summers*, who died insolvent and intestate on the 26th of February, 1876.

(1) Law Rep. 13 Eq. 333. (2) 4 Ch. D. 143.

Judgment for administration was obtained on the 25th of May, 1876.

By the Chief Clerk's general certificate, dated the 6th of August, 1878, the debts were certified, and interest was calculated, on such of them as bore interest, up to the date of the certificate.

By the order on further consideration, dated the 23rd of November, 1878, further interest on the debts was directed to be calculated up to the time of payment, and the fund in Court was directed to be apportioned by certificate among the creditors upon that footing.

The Chief Clerk however refused to allow the certificate of apportionment to be drawn up on that basis, on account of the decision of his Lordship in Chambers in *Re Trott's Estate, Pomeroy* v. *Summerhayes,* cited in *Seton* on Decrees (1), where the point is thus stated: "A creditor on an insolvent estate whose debt bears interest, is not entitled to interest up to the day of payment, but only to the date of the judgment for administration, which, by virtue of the *Judicature Act,* 1875, s. 10, is equivalent to an adjudication in bankruptcy."

The Chief Clerk also required that the general certificate and the order on further consideration should be altered in accordance with that decision.

Cozens-Hardy, for the Plaintiff, now applied for his Lordship's directions, submitting that if there had been a mistake it was now too late to correct it.

JESSEL, M.R., said he had no doubt that the proper practice was as stated in *Seton,* but declined in the present case to alter the order on further consideration; the apportionment would, therefore, be made in accordance with that order.

Solicitors: *Sharpe, Parkers, & Co.*

(1) 4th Ed. vol. ii. Addenda, p. 1674.

V.-C. M.
1879
Nov. 6.

EVELYN *v.* EVELYN.

[1879 E. 76.]

Practice—Motion to dismiss—Court or Chambers—Costs of Motion—Rules of Court, 1875, *Order* XXXVI., *rule* 4*a*.

An application to dismiss for want of prosecution may, according to circumstances, be made either in Chambers or to the Court.

If the usual notice of motion is given, and the Plaintiff does not at once submit to speed the cause and tender the costs of the notice, the Defendant if the usual order is made will have his costs of making the motion in Court.

THIS was an action to recover large estates which had been long in the possession of the Defendants; and the Defendants had, on the 1st of July, 1879, entered an appearance to the writ. No statement of claim had been delivered, and on the 29th of October each of the Defendants gave notice of motion to dismiss for want of prosecution.

Glasse, Q.C., and *Rawlinson*, for the motion.

Higgins, Q.C., and *Terrell*, for the Plaintiff, submitted to the usual order to speed the cause, but objected to pay the costs of the motion, as the application ought to have been made in Chambers, according to Order XXXVI., rule 4a: *Litton* v. *Litton* (1). Such applications should not be encouraged: *Chesterfield* v. *Black* (2). At Common Law these applications are never made to the Court. The case was very heavy and the Plaintiff was taken by surprise

(1) 3 Ch. D. 793.
(2) V.-C. H. June 13, 1876.

CHESTERFIELD *v.* BLACK.

THIS was a motion that the Defendants might be ordered to file further answers to certain interrogatories delivered by the Plaintiffs in the action.

Robinson, Q.C., and *Bush*, for the Plaintiffs.

Dickinson, Q.C., and *North*, and *Eddis*, Q.C., and *Chester*, for the Defendants respectively opposed.

HALL, V.C., said that both Defendants must answer fully the interrogatories which they had not answered, but he did not approve of these motions being brought into Court, as they might be heard in Chambers.

Solicitors: *Church, Sons, & Clark*, agents for *James & Oerton, Birmingham*; *C. E. Abbott*, agent for *F. T. C. Black, Chesterfield*; *Miller & Miller*.

Ca. Ln Finance Laws 26 W.R. 138.

by this motion. At all events, there was no occasion for two counsel.

Glasse, in reply:—

The Plaintiff might, when the notice of motion was given, have offered to speed the cause, paying the 6*s.* 8*d.* costs of the notice. The Plaintiff has chosen to let it come on, and must take the consequences. The Defendant could not tell that no opposition would be made, and was obliged to bring on the motion formally.

MALINS, V.C.:—

This action was commenced on the 20th of June, and the motion is made on the ground that up to this very day no statement of claim has been delivered. The Plaintiff giving the usual undertaking to go on with the cause, it is a matter of course that she has that liberty; and the only question is how the costs are to be dealt with. I am urged to allow no other costs than such as would be payable if the application had been made in Chambers; and it is argued that this is an application which ought always to be made in Chambers. Now, I am of opinion, that wherever there is a contest between the parties—where something would have to be argued and an appeal made to the discretion of the Court—the motion is properly made in Court, and the practice in my Court has certainly been to hear such motions, and I have never heard the course objected to; and I am informed that the same is the case in every other branch of the Court. The motion, therefore, *primâ facie*, is properly made in Court. The rule which has been referred to, saying that it may be made before a Judge or in Court, leaves it to the option of the parties whether they will make it in Chambers before a Judge or in Court before a Judge sitting in Court. There being that option, it follows, in my opinion, that it must be a question for the Court to decide in each particular case whether the motion is properly made in Court, or ought to have been made at Chambers.

I think Mr. *Glasse* has rightly stated the practice that when the Defendant gives notice of motion to dismiss for want of prosecution, which must leave an interval of two clear days, there is abundant opportunity afforded to the Plaintiff to say whether he

V.-C. M. 1879 EVELYN v. EVELYN.

will or will not go on with the suit; and if he intends to go on with the suit, and wishes to save expense, he has only to write to the Defendant, and say that he will give the usual undertaking to go on, and send the costs of the notice, which I suppose would be about 6*s.* 8*d.* In this case, therefore, the Plaintiff having received the notice of motion, it is the fault of her own solicitor that he did not so write, as that would have saved all further expense. No communication, however, took place on either side, and the motion comes on as a regular motion. I think, therefore, that the conduct of the Plaintiff has rendered it necessary to bring the motion before the Court, and the order will be the usual order, the Plaintiff undertaking to speed the cause. The costs of the Defendant will be paid by the Plaintiff as on a motion made properly in Court. The Taxing Master will decide whether it is a case for one counsel or for two. That I have at present nothing to do with.

Solicitor for Plaintiff: *G. H. Terrell.*
Solicitors for Defendant: *Walters, Deverell, & Walters.*

ANSON *v.* POTTER.

V.-C. B.
1879
Nov. 15.

[1879 A. 185.]]

Trustee—Power to give Receipts by Anticipation—Coalition of Life Interest and Reversion.

Where a fund is vested by a settlement in trustees for *A.* for life and over, and the reversion has been subsequently settled, the person entitled to the life interest and the trustees of the subsequent settlement are entitled to call for a transfer of the trust fund, and can give the original trustees an effectual discharge although the settlement does not provide for a transfer or payment by anticipation.

SPECIAL CASE for the opinion of the Court under the Rules of Court, 1875, Order XXXIV.

By an indenture of the 23rd of February, 1838, certain funds were settled upon trust when *Sarah A. Potter* should attain twenty-one or marry, to pay her the annual income for her life for her separate use, and after her death (and subject to a power thereby given to her to appoint that the yearly income of the trust funds should be paid to her husband, if surviving, for his life) in trust for her children.

On the 13th of June, 1843, Miss *Potter* married *T. V. Anson,* by whom she had two sons, *G. V. Anson,* since deceased, and the Plaintiff, *C. V. Anson.*

Mrs. *Anson* died in May, 1846, having by her will appointed that the income of the trust funds should be paid to her husband, *T. V. Anson,* during his life. By a settlement of the 31st of December, 1873, upon the marriage of *C. V. Anson* all his reversionary interest in the trust funds was assigned by him to trustees with full power to them to call in and compel payment, and to give effectual discharges for the same, and it was thereby provided that the receipts of the trustees for any money, &c., which might be paid to or transferred to them by virtue of that indenture, or in the execution of any of the trusts or powers thereof, should effectually discharge the person or persons transferring the same therefrom, and from being answerable or accountable for the loss or misapplication thereof.

G. V. Anson died in March, 1876, having by his will given all

V.-C. B. 1879 ANSON v. POTTER.

his property, real and personal, to his brother *C. V. Anson* absolutely.

By an indenture of the 9th of September, 1878, *T. V. Anson* assigned unto *C. V. Anson*, his executors, administrators, and assigns all the interest, dividends, and annual produce to accrue during the life of *T. V. Anson* of the investments representing the trust funds comprised in the settlement of 1838.

The Defendants, the trustees of the settlement of 1838, had paid to, or by direction of, *C. V. Anson*, the moiety of the trust funds to which *G. V. Anson* was entitled, subject to the life interest of *T. V. Anson*.

The Plaintiffs, *C. V. Anson* and his trustees, having applied to the Defendants to pay and transfer to them the residue of the trust funds, the Defendants objected that until the death of *T. V. Anson* none of the Plaintiffs, either jointly or severally, had power to give an effectual receipt for or discharge the Defendants from liability under the settlement of 1873 to account on the death of *T. V. Anson* for such moneys and investments to the extent of the funds therein comprised.

The question whether the Plaintiffs jointly or severally under the circumstances had a right to call for the payment and transfer of the moneys and investments now representing the residue of the trust funds subject to the settlement of 1838, or had power to give an effectual receipt and discharge for such moneys and investments to the Defendants, was submitted to the Court under the Rules of Court, 1875, Order XXXIV.

Sir *H. Jackson*, Q.C., and *W. Baker*, for the Plaintiffs.

Horton Smith, Q.C., and *Droop*, for the Defendants:—

The trustees of the settlement of 1838 have been advised that they will not properly be discharged if they pay over the Plaintiff's reversionary share in the lifetime of the tenant for life. Trustees will not be discharged unless the terms of their instrument have been strictly complied with: *Pell* v. *De Winton* (1); and, according to the opinion of conveyancers, unless the trust provide for payment by anticipation, such a payment would not discharge the

(1) 2 De G. & J. 13. 4 Jur. N.S. 226.

trustees, who were bound by the terms of their trust-deed to pay on a given event; and until the happening of that event payment could not be called for, and, indeed, could not be accepted: *Dav.* Conv. (1); *Lewin* on Trusts (2).

BACON, V.C.:—

I am not prepared to say that the Plaintiffs are not fairly, fully, and lawfully entitled to call for the payment of these moneys and investments. The fund consists of a sum of money subject to certain trusts, one of which is *T. V. Anson's* life interest. It does not exist in him, but it does exist, and is vested in the man who asks for the payment, and in him or the trustees of his settlement the reversionary interest is also vested. It is unreasonable, according to my opinion, to say that he and the trustees of his settlement are not now entitled to the possession of that, the title to which is disputed by nobody. Nobody is in existence, or ever can come into existence, who can quarrel with the payment which he now desires to have made. I have the greatest respect for the practice of conveyancers, and for the experience and consummate knowledge of the law which they derive from the constant study and practice of their profession. That is not the question before me now, for, although I respect their practice and opinions greatly, I am not at liberty to regard them as the law, but all I have to do is to decide the question myself according to my view of the law. All I have to decide now is whether the parties, who are entitled together to a reversonary interest, and to the life interest preceding that reversionary interest, can combine, so as to say that before the time limited by the settlement comes, the trustees shall pay that which they do not dispute they are bound to pay. I do not entertain the slightest doubt about it, and I do not wish it to be supposed or understood that I do entertain any doubt whatever about it.

Question answered in the affirmative.

Solicitors: *R. S. Fraser; Janson, Cobb, & Pearson.*

(1) 2nd Ed. vol. iii. p. 650; Ibid. 3rd Ed. vol. iii. p. 866.
(2) Page 314.

V.-C. H.
1879
Nov. 4.

In re THOMSON'S ESTATE
HERRING *v.* BARROW.

[1878 T. 94.]

Will—Construction—Life Interest—Superadded Power of Disposition inter vivos—Power or Property.

A testator by his will gave realty and personalty to his widow "for the term of her natural life to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof," and "in the event of her decease should there be anything remaining of the said property or any part thereof," he gave "said part or parts thereof" to certain persons:—

Held, that the widow of the testator took a life interest with an absolute power of disposition exerciseable by her during her lifetime, but not by testamentary instrument.

aff'd on app 14 Ch D. 263.

DEMURRER.

James Thomson, who was at the time of his death possessed of certain leasehold property at *Manchester*, made his will, dated the 16th of December, 1859, in the following terms:—"First, I give, devise, and bequeath all my messuages, lands, tenements, and hereditaments, and all my household furniture, ready money, goods and chattels, and all other parts of my real and personal estate and effects whatsoever and wheresoever, unto my dear wife *Margaret* for the term of her natural life, to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof, subject only to the payment of my just debts and funeral expenses, and the charges of proving and registering this my will. Secondly, in the event of her decease, should there be anything remaining of the said property or any part thereof, I give, devise, and bequeath said part or parts thereof to my sister *Elizabeth Barrow* and to the children of my brother *Robert Thomson* in manner following, that is to say, one-third to my sister *Elizabeth Barrow*, and the remainder to the children of my brother *Robert Thomson* share and share alike, and I appoint my said wife executrix of this my will."

The testator died in September, 1860, leaving his wife, *Margaret Thomson*, him surviving, and his will was duly proved by her.

Margaret Thomson, by her will, dated in 1876, after bequeathing certain pecuniary legacies, gave the residue of her real and personal estate to *John Herring* and *Margaret Herring* in equal shares absolutely, and appointed them her executors.

Upon the death of *Margaret Thomson*, *John* and *Margaret Herring* proved her will, and under it took possession of the leasehold property of the testator above mentioned. *Elizabeth Barrow* and the children of *Robert Thomson* then claimed this property upon the ground that *Margaret Thomson* had no testamentary power of disposition over it; and *Margaret Herring* and the representatives of *John Herring* (who had since died) brought the present action against them in order to obtain a declaration that they (the Plaintiffs) were entitled to it under the will of *Margaret Thomson*; and they delivered a statement of claim, to which the Defendants demurred in order to raise the question of construction.

Rawlins, for the demurrer:—

The widow of the testator is entitled to a life interest in his estate, with a power of disposition over the corpus exerciseable by act *inter vivos* only and not by will. The words "for the term of her natural life" are the words which govern the bequests, and the words "to be disposed of as she may think proper for her own use and benefit," and (in the gift over) "in the event of her decease should there be anything remaining," would be inappropriate if the power of disposition was testamentary and not limited to acts *inter vivos*. This is the true construction of the terms of the gift, and it is quite consistent with authority: *Surman* v. *Surman* (1); *Constable* v. *Bull* (2); *Bibbens* v. *Potter* (3); *Phillips* v. *Beal* (4); *Bradly* v. *Westcott* (5); *Theobald* on Wills (6). The gift over accordingly takes effect, and the Defendants are entitled.

Caldecott, for the statement of claim:—

This is a gift either of an absolute interest, *Bull* v. *Kingston* (7),

(1) 5 Madd. 123.
(2) 3 De G. & Sm. 411.
(3) 10 Ch. D. 733.
(4) 32 Beav. 25.
(5) 13 Ves. 445.
(6) Page 327.
(7) 1 Mer. 314.

V.-C. H. 1879 *In re* THOMSON'S ESTATE. HERRING v. BARROW.

Perry v. *Merritt* (1), or of a life interest with a general power of disposition, *Pennock* v. *Pennock* (2), *Scott* v. *Josselyn* (3); and it is immaterial to the Plaintiffs which construction is adopted, although the former appears to be the sounder. The words "to be disposed of as she may think proper" are quite general, and include disposition by will as well as by deed, and are not narrowed down by the words "for her own use and benefit," which are perfectly applicable to a gift by will for the satisfaction of her debts.

The cases cited on the other side do not apply. In *Surman* v. *Surman* (4) there was a condition attached to the gift that other persons should benefit. In *Constable* v. *Bull* (5) the terms of the will were so different that it cannot apply to the present case. So in *Bibbens* v. *Potter* (6) the codicil shewed that after the death of *A. M. Bibbens* other people were to have the property (with a certain exception) in moieties; and *Phillips* v. *Beal* (7) was also a case of a special character, while in *Bradly* v. *Westcott* (8) the lady to whom the life interest was given had a power of appointment by will over a specific part of the property, which shewed that she was not to have a general power of disposition over the whole of it.

HALL, V.C.:—

I am of opinion that the testator's widow took only an estate for life with a power of disposition only during her life, that is, not extending to a disposition by a testamentary instrument. We have in this case, first of all, this clearly expressed, that that which is given is given to her "for the term of her natural life." In the two cases to which Mr. *Caldecott* referred in favour of his argument that the gift was absolute, that circumstance did not exist. We have got here a gift for life, and then superadded to the life interest we have the words "to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof." Those words so superadded (as is in fact

(1) Law Rep. 18 Eq. 152.
(2) Ibid. 13 Eq. 144.
(3) 26 Beav. 174.
(4) 5 Madd. 123.
(5) 3 De G. & Sm. 411.
(6) 10 Ch. D. 733.
(7) 32 Beav. 25.
(8) 13 Ves. 445.

conceded on behalf of those who would be entitled under the gift over) give to her some power of disposition over the capital. I think that those words confer a power and do not give property. That view reconciles the whole. The words "for her natural life" are insensible unless, as regards property, she was only to take a limited interest. The words "secondly, in the event of her decease should there be anything remaining of the said property or any part thereof," draw a line at the death of the lady, so that what is "remaining" at the moment of her death becomes at that time the subject of the gift over and belongs to the residuary legatees: "remaining" is consistent with there being a power of disposition other than a testamentary power. When once you arrive at the conclusion that it is power and not property which is intended, you can give effect to the limited interest for life, superadding a power of disposition not extending to a testamentary instrument; and this seems to me the true construction of this will. It follows that what remains at the decease of the widow actually undisposed of by her during her life becomes subject to the gift over, and therefore that the persons claiming under the will of this lady have not any title or interest. The demurrer must be allowed.

Solicitors for Plaintiffs: *Thomson & Edwards*, agents for *Thomas James Scott, Penrith, Cumberland.*

Solicitors for Defendants: *Brownlow & Howe.*

FRY, J.

1879

Nov. 8.

SMITH *v.* ROBINSON.

[1877 S. 402.]

Vendor and Purchaser—Specific Performance—Condition limiting Length of Title—Objection to prior Title disclosed by Vendor—Reference as to Title—Concealment of Incumbrance—Penalty—22 & 23 Vict. c. 35, s. 24.

14 Ch D 255 app cas 245.

Freehold property was sold in 1877 subject to a condition that the title should commence with a deed dated the 30th of December, 1867, and that no earlier or other title should be required or inquired into by the purchaser:—

Held, that this condition did not preclude the purchaser from insisting on an objection to the prior title which was not discovered through any inquiry made by him, but was accidentally disclosed by the vendor.

But *held*, that, in an action by the vendor for the specific performance of the contract, the purchaser was only entitled to an inquiry whether the vendor could make a good holding title to the property.

Where there is a condition of sale that no title to the property sold shall be shewn before a certain date, *semble*, that sect. 24 of 22 & 23 Vict. c. 35, does not apply to the concealment of an incumbrance prior to that date.

THIS was an action by a vendor for the specific performance of a contract for the purchase of some freehold houses.

In July, 1877, the Plaintiff put up the houses for sale by auction, together with some other property, but the houses were not then sold.

The Defendant afterwards agreed to purchase the houses, subject to the conditions of sale at the auction, and signed an agreement in writing accordingly.

The third condition provided that the abstract should commence with an indenture dated the 30th of December, 1867, and that no earlier or other title should be required or inquired into by the purchaser.

The Plaintiff's solicitor afterwards sent to the Defendant's solicitor an abstract of title to the property, commencing with a will dated the 30th of March, 1768. In a letter accompanying the abstract the Plaintiff's solicitor said: "The deeds can be seen on your making an appointment for the purpose. Under the conditions of sale the title commences with an indenture dated the 30th of

December, 1867, but, as I have a full abstract, I think it only right to send it on, without prejudice, however, to the conditions of sale." The abstract thus sent was a copy of one which had been furnished to the Plaintiff when he purchased the property in March, 1877. The abstract contained (*inter alia*) a lease of the property, dated the 30th of December 1853, granted by one *T. L. Fish* to one *H. A. Fisher*, for a term of thirty years from the 25th of March, 1853, at an annual rent of £80. *Fisher* afterwards acquired the reversion in fee in the property expectant on the determination of this lease, and by his representatives the property was sold to the Plaintiff.

The Defendant's solicitor afterwards attended at the office of the Plaintiff's solicitor to compare the abstract with the deeds. A bundle of deeds was then handed to him, and among them he discovered a deed which was not included in the abstract. This deed purported to be the counterpart of a lease, dated the 9th of April, 1851, whereby the property was demised by one *Ann Smith* to *H. A. Fisher*, for a term of thirty-one years from the 25th of December, 1851, less seven days, at the yearly rent of £49. By this deed the rent was reserved to *Ann Smith*, her executors, administrators, or assigns.

Upon this discovery being made the Defendant's solicitor asked for an explanation, and not receiving any satisfactory reply, he refused to complete the purchase, and the action was then commenced.

The Defendant alleged that the third condition of sale was not, under the circumstances, binding upon him.

The Plaintiff's solicitor made an affidavit in which he said that the bundle of deeds in which the counterpart of the lease of the 9th of April, 1851, was discovered, was a bundle which was handed over to him on the completion of the purchase of the property by the Plaintiff; that he had since held the deeds for the Plaintiff, but that he had never opened the bundle since it came into his hands, and that he was unaware of the existence of the counterpart until its discovery by the Defendant's solicitor.

Dauney, for the Plaintiff :—

A condition of this kind is binding, and it must have a fair

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meaning given to it: *Hume* v. *Bentley* (1); *In re Banister* (2); *Best* v. *Hamand* (3).

[FRY, J.:—In *Waddell* v. *Wolfe* (4) the words of the condition were almost identical with those of the present one, and it was held that the purchaser was not precluded from taking an objection which he had himself discovered to the title.]

That was a case of total failure of the contract. At any rate, if it cannot be reconciled with the late decisions in the Court of Appeal, they must prevail. If a purchaser discovered that he himself was already the owner of the property sold, of course that would go to the root of the contract, for there would be nothing to pass by the conveyance, and the condition would not apply: *Jones* v. *Clifford* (5). Here the purchaser bought the property cheaply because he was to take only a ten years' title. If the purchaser could prove affirmatively that the vendor could not give him a title, the Court would not enforce specific performance, not because the condition is not binding, but because there would then be no contract at all.

But, even if the condition is binding, there is no objection to the title. The lease of April, 1851, was at a rent of £49, and it is inconceivable that the same lessee should take a concurrent lease of the property at an increased rent, unless the first lease had been surrendered. Moreover, the counterpart of the lease ought to have been in the possession of *Ann Smith*, or her representatives, not in ours.

There ought to be an immediate judgment for specific performance. But, if not, there should be an inquiry whether the Plaintiff can make a good holding title to the property, as was directed by the Court of Appeal in *In re Banister*.

A. Whitaker, for the Defendant:—

The condition does not apply, for the purchaser has not inquired into the prior title; it has been disclosed by the vendor. The condition has been in effect waived by him. The fact that the letter sent with the abstract is expressed to be "without prejudice"

(1) 5 De G. & Sm. 520.
(2) 12 Ch. D. 131.
(3) 12 Ch. D. 1.
(4) Law Rep. 9 Q. B. 515.
(5) 3 Ch. D. 779, 790.

is immaterial, for the counterpart in question was not included in the abstract, and the deeds were not produced without prejudice.

A solicitor might make such a condition knowing of the existence of some prior incumbrance on the property, and then afterwards voluntarily disclose the incumbrance, and thus escape the penalties imposed by 22 & 23 Vict. c. 35, s. 24.

[FRY, J.:—Could he be liable to that penalty where the condition was that no title should be shewn before a certain date?]

It is not for the purchaser to prove that there is a material blot on the title. *Ann Smith* was clearly a lessee, and there is nothing to shew that the lease to her is not still subsisting. It is conceivable that she was a mortgagee for a term, and she may have purported to grant a lease which was afterwards discovered to be an improper one. Her lessee may then have taken a fresh lease from the mortgagor. But that would not put an end to *Ann Smith's* own mortgage term.

Dauney, in reply:—

The provisions of sect. 24 of 22 & 23 Vict. c. 35, have no application, otherwise it would be impossible to limit by a condition the statutory length of title. If a vendor is willing to take less money for his property on account of his shewing only a ten years' title, it must be assumed that he has a reason for doing so, that there is something shaky in his title.

The letter sent with the abstract must be taken to apply to the deeds, as well as to the abstract. The disclosure of the counterpart was a mere accident; it is as if the purchaser had found it lying on the ground on his way to the vendor's solicitor's office. The condition is a valid one, and it would be broken by an inquiry into the prior title.

FRY, J.:—

The first question is, whether the purchaser is precluded by the condition from raising the objection which he has raised. In my opinion he is not. The condition precludes the purchaser from doing two things: first, from making any requisition on the earlier

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title; and secondly, from making any inquiry into it. It does not preclude the vendor from disclosing or admitting some blot on his title about which the purchaser does not inquire. And that is what the vendor has actually done. He has himself confessed the objection to the title; it has not been discovered by the purchaser. If I were to hold that the condition applied, I should be stretching its meaning. Similar conditions have in many cases, such as *Waddell* v. *Wolfe* (1), been construed strictly. The next question is whether the objection to the title is a material one. In my opinion it is. The vendor says he has been unable to learn anything about *Ann Smith's* lease, which is very remarkable if it was surrendered as late as 1853. It appears to me that the condition cannot apply to a case where the vendor has himself raised the difficulty and confessed the cloud on his title. I must, therefore, take one of two courses, at the election of the Plaintiff. I must either dismiss his action with costs, or I must, as was done in *In re Banister* (2), direct an inquiry whether a good holding title to the property can be made.

Dauney elected to take the inquiry.

FRY, J.:—The Plaintiff must pay the costs of the action up to and including the trial. Then I direct the inquiry. I shall reserve the subsequent costs and give liberty to apply as to the conveyance, the subsequent costs, and generally.

Solicitor for Plaintiff: *E. W. Parkes.*
Solicitor for Defendant: *H. Eede.*

(1) Law Rep. 9 Q. B. 515. (2) 12 Ch. D. 131.

Followed. CHARLES RICKARDS, LD. *v.* OPPENHAIM [1950] 1 K. B. 616

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FRY, J.

[1878 C. 411.]

1879

Nov. 13, 14.

Vendor and Purchaser—Specific Performance—Notice to make Time of Essence of Contract—Reasonableness—Laches.

Post 1876

When, after a contract for the sale of land has been entered into, a notice is given to make time of the essence of the contract, the question whether the notice is reasonable or not must be judged of as at the date when it is given.

The Plaintiff held a lease from the Defendant which gave him an option of purchasing the demised property at any time during the term, on giving the lessor three months' previous notice in writing. On the 24th of March, 1877, the Plaintiff gave the Defendant notice of his intention to exercise the option. There were some difficulties in completing the Defendant's title to the property, and an abstract of title was not delivered to the Plaintiff's solicitor till the 17th of June, 1878. The Plaintiff's solicitor not having acknowledged the receipt of the abstract, and having neglected to answer several letters from the Defendant's solicitors, they, on the 16th of September, wrote to the Plaintiff himself, asking whether he intended to complete the purchase. The Plaintiff replied the next day that he would write at once to his solicitor. On the 24th of September, 1878, no further communication having been received from the Plaintiff or his solicitor, the Defendant gave the Plaintiff a notice in writing, requiring him to complete the purchase, and stating that, unless he completed it on or before the 31st of October, 1878, the Defendant would treat the contract as rescinded, and that in that respect time should be deemed of the essence of the contract. On the 26th of September, 1878, the Plaintiff acknowledged the receipt of the notice, and said that he had seen his solicitor, who had promised to proceed as soon as possible. On the 1st of November, 1878, no further communications having been received from the Plaintiff or his solicitor, the Defendant's solicitors wrote to the Plaintiff, that the Defendant, in pursuance of his notice, declared the contract at an end; and they requested the return of the abstract, and demanded payment of rent for the property. The Plaintiff had been in possession of the property ever since his notice to purchase, but had refused to pay any rent after the 24th of June, 1877. On the 21st of November, 1878, the Plaintiff commenced his action for the specific performance of the contract to purchase:—

Held, that the notice of the 24th of September fixed an unreasonably short time for the completion of the purchase, and was therefore invalid.

Specific performance was decreed, and the Defendant was ordered to pay the costs of the action up to and including the trial.

THIS was an action for the specific performance of a contract for the sale of a freehold house to the Plaintiff's devisor.

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By a settlement, dated the 7th of May, 1869, made on the marriage of the Defendant and his wife, the property was (with other property) limited to trustees, to the use of such persons and for such estates as the husband and wife should jointly appoint, with remainder to the use of the trustees during the joint lives of the husband and wife, upon trust to pay the rents to the wife for her separate use, with remainder to the use of the husband during his life, with remainder to the use of such persons as the wife should by will appoint.

By an indenture of appointment and lease, dated the 21st of November, 1874, the Defendant and his wife, in exercise of the power contained in the settlement, limited and appointed that the property should remain and be to the use of *P. S. Crawford*, his executors, administrators, and assigns, for the term of fourteen years from the 24th of June, 1874, subject to the yearly rent of £120. In this deed there was the following proviso:—"Provided lastly, and it is hereby further declared and agreed that the lessee, his executors, administrators, or assigns, may, at any time during the continuance of the term hereby granted, on giving to the lessors, their heirs or assigns, three calendar months' previous notice in writing of his or their intention so to do, purchase the hereditaments and premises hereinbefore expressed to be hereby appointed, for an estate in fee simple in possession free from incumbrances, at the price of £2600."

P. S. Crawford died on the 23rd of June, 1876, being at the time of his death in possession of the property under the lease of the 21st of November, 1874. By his will he devised all his real and personal estates to the Plaintiff, *H. S. Crawford*, and one *T. Crawford*, their heirs, executors, and administrators respectively, upon certain trusts, and appointed them executors of his will. *T. Crawford* renounced probate of the will, and disclaimed the trusts thereof. In February, 1875, the Defendant's wife died, having by her will appointed the property comprised in the deed of the 21st of November, 1874, subject to the Defendant's life interest therein, to four persons as tenants in common in fee. One of those persons died in June, 1877. On the 24th of March, 1877, the Plaintiff, as executor of *P. S. Crawford*, gave notice in writing to the Defendant that he would and did thereby exercise

the option of purchase of the property given by the deed of the 21st of November, 1874. The title to the property was a somewhat complicated one, and considerable delay took place in ascertaining who were the persons entitled in reversion under the will of the Defendant's wife, and in obtaining their consent to join in the conveyance to the Plaintiff, and also in getting in an outstanding legal estate, and the result was that the abstract of title was not sent to the Plaintiff's solicitor until the 17th of June, 1878. With the abstract the Defendant's solicitors sent a letter to the Plaintiff's solicitor, explaining the delay which had arisen in completing the title. They also asked that the receipt of the abstract might be acknowledged. No reply was received to this letter, and on the 21st of June, 1878, the Defendant's solicitors again wrote to the Plaintiff's solicitor requesting an acknowledgment of the receipt of the abstract, and saying that the title deeds could be inspected at any time. To this letter no reply was received. On the 12th of July, 1878, the Defendant's solicitors again wrote to the Plaintiff's solicitor to the same effect, adding that, in default of a prompt reply, they should infer that the Plaintiff did not intend to complete the purchase, and should take steps to recover the rent of the property. The Plaintiff had remained in possession of the property, but had paid no rent since the 24th of June, 1877, and had refused to pay any, on the ground that he had become in equity the owner of the property. No reply was received to that letter. On the 21st of August, 1878, another similar letter was sent, by which a demand was made for payment of the rent up to Midsummer, 1878. No reply was received to that letter. On the 16th of September, 1878, the Defendant's solicitors wrote to the Plaintiff himself, telling him what had taken place, and asking him whether he intended to complete, when he would be ready to do so, and whether in the meantime he would pay a fair sum for the occupation of the premises, to be ultimately applied either in payment of rent or interest as might be right, such payment to be made without prejudice. On the 17th of September the Plaintiff replied that he would write at once to his solicitor, and send him the letter of the 16th of September. On the 24th of September, 1878, no further communication having been received from the Plaintiff or his solicitor, the

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Defendant sent to the Plaintiff a notice in writing, requiring him to complete the purchase, and stating that, unless he completed it on or before the 31st of October, 1878, the Defendant and the several other persons entitled to any estate in the property would treat the contract as rescinded and at an end, and that in that respect time should be deemed of the essence of the contract. On the 26th of September the Plaintiff wrote to the Defendant, acknowledging the receipt of the notice, and saying that he had seen his solicitor, who had promised to proceed as soon as possible. From that time up to the 1st of November, 1878, no further communication was received by the Defendant or his solicitors from the Plaintiff or his solicitor, and on the 1st of November, 1878, the Defendant's solicitors wrote to the Plaintiff, saying that the Defendant, in pursuance of the notice of the 24th of September, declared the contract at an end, requesting the return of the abstract, and requiring the payment of the rent. On the 21st of November, 1878, the writ in the action was issued.

Cookson, Q.C., and *A. Brown*, for the Plaintiff:—

The notice of the 24th of September can have no effect in making time of the essence of the contract, for it fixed an unreasonably short time for the completion of the purchase; *Pegg* v. *Wisden* (1); *McMurray* v. *Spicer* (2); *Radcliffe* v. *Warrington* (3). Indeed it may be doubted whether the Defendant could be entitled to give such a notice, when something remained to be done by himself to complete the purchase. The Plaintiff has not been guilty of any delay which can disentitle him to the relief which he claims: *Southcomb* v. *Bishop of Exeter* (4); *Mills* v. *Haywood* (5).

North, Q.C., and *Buckley*, for the Defendant:—

The time fixed by the notice of September, viz., more than four months from the delivery of the abstract, was a reasonable time. A right of pre-emption or an option to purchase ought to be strictly

(1) 16 Beav. 239.
(2) Law Rep. 5 Eq. 527.
(3) 12 Ves. 326.
(4) 6 Hare, 213.
(5) 6 Ch. D. 196.

complied with: *Dawson* v. *Dawson* (1); *Brooke* v. *Garrod* (2). *Pegg* v. *Wisden* (3) is distinguishable from the present case, and in *Macbryde* v. *Weekes* (4) a month's notice to complete was held sufficient. *Reynolds* v. *Nelson* (5) is in our favour. The Plaintiff himself has been guilty of such unreasonable delay as to disentitle him to relief: *Benson* v. *Lamb* (6); *Nott* v. *Rickard* (7).

Cookson, in reply.

The real question is whether the notice of September was a reasonable one. In almost all the cases in which a notice to make time of the essence of the contract has been held valid, the notice in effect required some specific step to be taken, the next step towards the completion of the purchase. Such a notice can be supported only if there has been unreasonable delay on the other side: *King* v. *Wilson* (8); *Taylor* v. *Brown* (9). In *Pegg* v. *Wisden* the notice was held bad. In the present case a number of things have to be done in the five weeks, and that time is unreasonable, especially looking at the Defendant's own delay. It is a very material circumstance whether the Defendant was in possession as lessee or as purchaser. By refusing to pay rent he was daily insisting on his title as purchaser. In *Mills* v. *Haywood* (10) the purchaser had paid rent.

FRY, J.:—

The Plaintiff seeks the specific performance of a contract for the sale of land which is constituted by an option of purchase contained in a lease granted to the Plaintiff, and a notice to exercise the option given by the Plaintiff on the 24th of March, 1877. The three months fixed by the notice expired on the 24th of June, 1877. The defence is based on two grounds, first, that the contract came to an end by force of the notice given by the Defendant on the 24th of September, 1878; secondly, that the Plaintiff's right to relief has been lost by his own laches and delay. The

(1) 8 Sim. 346.
(2) 3 K. & J. 608; 2 De G. & J. 62.
(3) 16 Beav. 239.
(4) 22 Beav. 533.
(5) 6 Madd. 18.
(6) 9 Beav. 502.
(7) 22 Beav. 307.
(8) 6 Beav. 124.
(9) 2 Beav. 180.
(10) 6 Ch. D. 196.

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notice of the 24th of September required the Plaintiff to complete the purchase by the 31st of October, a period of little more than five weeks. The question is whether that notice was or was not a reasonable one? For it has been held that, in order to make time of the essence of a contract after the contract has been entered into, the time fixed by the notice must be a reasonable one. And the question of reasonableness must be determined as at the date when the notice is given. In the present case the abstract of title was not delivered to the purchaser till the 17th of June, 1878, about a year after the expiration of the notice to purchase, but under the circumstances this delay was not in my view unreasonable. I cannot commend the course adopted by the Plaintiff's solicitor in not acknowledging the receipt of the abstract, or answering the letters sent to him by the Defendant's solicitors with the abstract and subsequently. But on the 16th of September, 1878, the Defendant's solicitors sent the Plaintiff himself a long letter, detailing what had taken place, and the Plaintiff, on the 17th of September, replied by a letter which, according to my view of it, intimated his intention to go on with the purchase. That was the state of things when the notice of the 24th of September was given. It is necessary to consider what then remained to be done to complete the purchase. The abstract of title was not a very simple one. Probably requisitions on the title would have to be made, there would be answers to the requisitions, and probably rejoinders to the answers. The draft of the conveyance would have to be prepared by the purchaser and approved by the vendor; the conveyance would have to be engrossed, and the parties got together to execute it. I do not think that five weeks from the 24th of September was a reasonable time to fix for the completion of all these steps, especially remembering that the time of year was the Long Vacation. The further question was raised whether such a notice could be of any effect when acts remained to be done by the person giving it. It is not, however, necessary for me to determine that point, and I will only say that in such a case some latitude in respect of time is reasonable, and I think such a notice ought to fix the longest time that could be reasonably required for the performance of the acts which remained to be done. I hold, therefore, that the notice was

not valid, and that the mere fact that the purchase was not completed on the 31st of October is not a bar to the Plaintiff's right to relief.

There remains the question whether there has been such delay on the Plaintiff's own part as to disentitle him to relief. Looking at the authorities, I am unable to say that the delay from the 17th of June, 1878, when the abstract was delivered, to the 21st of November, 1878, when the writ in the action was issued, is such as to disentitle the Plaintiff to specific performance of the contract.

It is to be borne in mind that, from the 24th of June, 1877, the Plaintiff has insisted that he was in possession of the property, not as lessee, but as purchaser. It is undoubtedly hard on the Defendant that he should be kept out of both his rent and the interest on his purchase-money. But I think the Defendant had a remedy; he might have insisted on the Plaintiff's performing his contract, and either paying the rent or paying the purchase-money into Court. I must, though I own that I do so with considerable reluctance, give judgment for the Plaintiff, and I cannot deprive him of costs. There will be a declaration that the Plaintiff is entitled to have the contract specifically performed, and an inquiry whether the Defendant can make a good title to the property.

Further consideration will be adjourned. The Defendant must pay the costs of the action up to and including the trial.

Solicitor for Plaintiff: *W. Rogers.*

Solicitors for Defendant: *E. Doyle & Sons,* agents for *Taynton & Sons, Gloucester.*

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1879
Nov. 21

CHORLTON *v.* DICKIE.

[1875 C. 218.]

Practice—Bankruptcy of Defendant after Notice of Trial—Order of Revivor against Trustee—Non-appearance—Filing Pleadings and Notice of Motion for Judgment—Non-appearance of Defendant at Trial—Affidavit of Service of Notice of Trial—Rules of Court, 1875, *Order* XVI., *r.* 13; *Order* XIX., *r.* 6; *Order* XXXVI., *rr.* 18, 20; *Order* L., *rr.* 2, 4, 5.

14 BD 415

A Defendant became bankrupt after service of notice of trial, and the common order of revivor was then made against his trustee, and served on him. The trustee did not enter an appearance. Notice was served on him that the action was restored to the paper for trial, but he did not appear at the trial:—

Held, that it was not necessary for the Plaintiff to file the pleadings or a notice of motion for judgment as against the trustee, under rule 6 of Order XIX. of the Rules of Court, 1875.

Semble, that when a Defendant does not appear at the trial, it is not necessary for the Plaintiff to prove service of notice of trial.

THIS action was commenced, by bill filed in the Court of Chancery, by one of three trustees against his two co-trustees, to compel them to make good the loss resulting from a breach of trust. The pleadings having been closed, notice of trial was, on the 23rd of December, 1878, given by the Plaintiff for the 3rd of January, 1879. This notice was served on the solicitors on the record who then appeared for both the Defendants, and they indorsed the notice as received by them for both Defendants. The action was set down for trial, but before it came on for trial the Defendant *Dickie* was adjudicated a bankrupt, and *T. W. Gillibrand* was appointed trustee of his property. On the 23rd of June, 1878, an order of course was made at the Rolls, upon the petition of the Plaintiff, that the action and the proceedings therein should be carried on and prosecuted against *Gillibrand*, as such trustee, in like manner as if he had been originally a Defendant thereto. This order was served on *Gillibrand* on the 25th of June, 1879. He did not enter an appearance. On the 26th of July, 1879, he was served with a notice that the action, which had been set down for trial and since marked to stand over in consequence of the bankruptcy

of *Dickie*, had been, on the 25th of July, restored to the paper for trial before Mr. Justice *Fry*, and marked not to be in the paper until the 31st of July, 1879. On the 31st of July the action came on for trial. Neither *Dickie* nor his trustee appeared. *McLachlan*, the other Defendant, appeared. Judgment was given for the Plaintiff. The Registrar afterwards refused to draw up the judgment, without the direction of the Judge, on two grounds;—first, that, as *Gillibrand* had not entered an appearance, the pleadings and notice of motion for judgment in default of appearance ought to have been filed as against him; secondly, that an affidavit of service of notice of trial on *Dickie* ought to have been filed before the trial.

W. Renshaw, for the Plaintiff, asked for the direction of the Court:—

The effect of rules 2, 4, 5, of Order L. of the Rules of Court, 1875, and the order of revivor made under them, is to place the trustee in exactly the same position as if he had been originally made a Defendant. When the order of revivor was made, all the necessary steps had been taken as against both Defendants, and the benefit of those steps enured as against the trustee when he was substituted for the Defendant *Dickie*. It is not like the case of adding a new party by amendment under rule 13 of Order XVI. In such a case the Plaintiff would have to begin *de novo* as against the new party. But that is not so in the present case. Rule 6 of Order XIX. has no application, for there was no document which required to be delivered. The action was ripe for trial, and the order of revivor put the trustee in the shoes of *Dickie*.

FRY, J.:—

I think that what has been done is sufficient, notice of trial having been already served on the Defendant *Dickie*. I think that the intention and effect of the order of revivor is to substitute the trustee for the original Defendant, and to place him in his exact position. Of course, if any subsequent step had to be taken in the action, notice of it must be served on the trustee.

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W. Renshaw:—With regard to the other objection, it is not the practice in the Common Law Divisions to require the Plaintiff, when the Defendant does not appear at the trial, to prove service of notice of trial: *Wilson's* Judicature Acts (1). It is considered that the Defendant is sufficiently protected by the power given to the Court, by rule 20 of Order XXXVI., to set aside the judgment. There is, however, a decision of your Lordship to the contrary in *Cockshott* v. *London General Cab Company* (2).

[FRY, J.:—I came to that conclusion because I was told by the Registrar that the practice was always to require the affidavit. I do not wish to impose on Plaintiffs the obligation of proving service of notice of trial, if the other Divisions do not. In the Court of Chancery an affidavit of service of notice of motion for decree was always required.]

In the present case the notice of trial is indorsed by the solicitors on the record as received by them on behalf of both the Defendants.

FRY, J.:—

I am very much inclined to think that the power of the Court to set aside the judgment is sufficient protection to the Defendant. In the present case I do not think the affidavit is necessary.

Solicitors for Plaintiff: *Shaw & Tremellen*, agents for *Thomas Jepson, Manchester.*

(1) 2nd Ed. p. 252. (2) 26 W. R. 31.

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Liquidation by Arrangement—Discharge of Debtor—Debt incurred by means of Fraud—Right of Creditor to sue—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 13, 49, 125 (*sub-s.* 10)—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 15—*Bankruptcy Rules*, 1870, *rr.* 260, 289.

After a liquidating debtor has obtained his discharge, a creditor, whose debt has been incurred by means of fraud, is entitled to sue the debtor at law for the amount of the debt, notwithstanding that the liquidation is not closed, and that he has proved the debt in the liquidation.

The Court of Bankruptcy will not, in such a case, restrain the action.

If the creditor has received any dividends in the liquidation, the debtor will only remain liable for the unpaid balance of the debt; and, if no dividends have been paid, the debtor, if he pays the creditor in full, is entitled to stand in his place in respect of any dividend which may be declared on the debt in the liquidation.

Whether sect. 15 of the *Debtors Act*, 1869, applies to a liquidation by arrangement, *quære*.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

On the 12th of February, 1879, *F. B. Chatterton* filed a liquidation petition. The first meeting of the creditors was held on the 5th of March, 1879, when the creditors resolved upon a liquidation by arrangement, and granted the debtor an immediate discharge. *J. L. Hemming* attended the meeting and proved a debt of £250. He voted against the resolutions, and afterwards unsuccessfully opposed their registration. They were registered on the 4th of April, 1879. On the 19th of April, 1879, *Hemming* commenced an action against *Chatterton* in the Common Pleas Division for the £250. The Defendant appeared to the writ, and on the 5th of May, 1879, a statement of claim was delivered, by which it was alleged that the debt had been incurred by means of fraud on the part of the Defendant. The liquidation had not been closed. The Registrar, on the application of *Chatterton*, made an order that, pending the proceedings in the liquidation, *Hemming* should be absolutely restrained from taking any further proceedings in the action. The Registrar was of opinion that, until the liquidation had been closed and it had been ascertained what

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the amount of the dividends and what the unpaid balance of the debt would be, sect. 15 of the *Debtors Act*, 1869, prevented the bringing of the action.

Hemming appealed.

Northmore Lawrence, for the Appellant:—

After the debtor has obtained his discharge, any property which he may acquire vests in him, not in the trustee, even though the liquidation be not closed: *Bankruptcy Act*, 1869, ss. 49, 125, sub-s. 10; *Ebbs* v. *Boulnois* (1). The discharge does not release the debtor from debts incurred by means of fraud, and it follows that, after the discharge is granted, a creditor whose debt was incurred by fraud is entitled to sue the debtor, for the action can affect only property in which the general creditors under the liquidation have no interest. The judgments of *James* and *Mellish*, L.JJ., in *Cobham* v. *Dalton* (2), shew that this is so, though the actual decision was that the power of the Court, under sects. 12, 13 of the Act, and rule 260 of the Bankruptcy Rules, 1870, to restrain proceedings against the debtor, continued as long as the bankruptcy proceedings were pending.

[BAGGALLAY, L.J.:—In that case the debt had not been proved in the bankruptcy.]

That can make no difference. Sect. 15 of the *Debtors Act*, 1869, supports this view: *Ex parte Halford* (3).

Winslow, Q.C., and *Terrell*, for the debtor:—

Sect. 15 of the *Debtors Act* shews that the creditor can only sue for the unpaid balance of his debt; that implies that he cannot sue until he has ascertained what is the amount of the dividend payable to him in the liquidation, and this he cannot do until the liquidation has been closed. The Registrar held that no creditor in respect of a provable debt could interfere with the person or property of the debtor until after the close of the liquidation: Bankruptcy Rules, 1870, r. 289. Till that time has arrived the debtor is not to be harassed by legal proceedings; the trustee has

(1) Law Rep. 10 Ch. 479. (2) Law Rep. 10 Ch. 655.
(3) Law Rep. 19 Eq. 436.

a right to require his assistance in the winding-up of the estate. The Court has a discretion as to allowing an action to proceed, and will not allow a clearly vexatious action to go on: *Ex parte Lopez* (1). Sect. 49 speaks of a provable debt, which is a different thing from a proved debt. There is no express right of action given to a creditor who has proved; by proving he elects to take his remedy in that way only: *Cullen's* Bankrupt Law (2); *Ex parte Bozannet* (3); *Ex parte Joseph* (4); *Bradley* v. *Millar* (5).

Northmore Lawrence, in reply:—

Sect. 15 does not apply to liquidation by arrangement; it applies to compositions and to arrangements in a bankruptcy under sect. 28 of the Act, *i.e.*, to arrangements which at once fix the amount to be paid by the debtor, and ascertain the unpaid balance of the debt. A majority of friendly creditors might keep a liquidation open for ever, and thus deprive a creditor whose debts had been incurred by fraud of his remedy against the debtor.

[THESIGER, L.J.:—I doubt whether they could: *Bankruptcy Act*, 1869, s. 13; Bankruptcy Rules, 1870, r. 260.]

Why should I be kept waiting till the close of the liquidation, when the other creditors who can prove have no right to the debtor's after-acquired property, and subsequent creditors may acquire priority over me?

Nov. 27. THESIGER, L.J., delivered the judgment of the Court (*James*, *Baggallay*, and *Thesiger*, L.JJ.) as follows:—

In this case the creditors under a liquidation by arrangement gave the debtor his discharge as soon as the liquidation resolutions were passed, and the discharge was duly certified by the Registrar. The debtor was thereupon sued by the present Appellant for a debt, which, in the statement of claim delivered in the action, is alleged to have been, and for the purposes of this appeal must be taken to have been, incurred by means of fraud on the part of the

(1) 5 Ch. D. 65.
(2) Ed. of 1800, pp. 148, 149.
(3) 1 Rose, 181.
(4) Ibid. 184.
(5) 1 Rose, 273.

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Defendant. The debt had been previously made the subject of proof in the liquidation, and, upon application made to the Registrar, sitting as Chief Judge, an order was made by which further proceedings in the action were restrained pending the liquidation. We are of opinion that this order must be set aside. By the 49th section of the *Bankruptcy Act*, 1869, it is provided that an order of discharge shall not release a bankrupt "from any debt or liability incurred by means of any fraud or breach of trust." A liquidating debtor is placed in the same position in this respect as a bankrupt by the 10th sub-section of sect. 125 of the same Act. In reference to these sections the old Court of Appeal in Chancery decided in *Cobham* v. *Dalton* (1) that a creditor who, before the order of discharge is obtained, takes proceedings against the person or property of a debtor, in respect of a debt or liability incurred by means of fraud, may be and ought to be restrained. It was not absolutely necessary for the Court in that case to decide the further question whether, after the order of discharge, such restraint should be removed. But it was necessarily involved in the discussion of the case, and the opinions of the Court upon it were very clearly expressed. Lord Justice *Mellish* said (2): "But, as soon as the order of discharge has been obtained, then, as the Act says that a debtor is not released from a debt of this description, the creditor can enforce his remedy against the after-acquired property or the person of the debtor." Lord Justice *James* used language to the same effect. He said (3): "When the order of discharge has been obtained, or the bankruptcy has been closed, the right of creditors whose debts are not barred to the future assets accrues, the creditors whose debts are barred having lost all remedy. When that time arrives the creditor whose debt is not barred will have a right against the debtor's property, independently of the bankruptcy, and may resort to his remedy against the person in order to enforce it." From both the passages quoted may clearly be collected the view that the time from which dates the debtor's right to after-acquired property must be the time when the right of a creditor to take proceedings in respect of a debt incurred by means of fraud, either

(1) Law Rep. 10 Ch. 655. (2) Law Rep. 10 Ch. 657.
(3) Law Rep. 10 Ch. 656.

against the debtor's property or person, accrues. If this be so, then, the case of *Ebbs* v. *Boulnois* (1) having laid down that property acquired by a liquidating debtor after his discharge does not vest in his trustee, although the liquidation be not closed—in other words, having laid down that, after the discharge, the debtor is in the same position as if the barred creditors had actually released him, and his future property is his own, it follows that the time when the order of discharge becomes effective is the time when the excepted creditors' rights accrue. And this appears to us, independently of authority, the reasonable interpretation of the meaning of the Legislature as expressed in the *Bankruptcy Act.* What can be more reasonable than that the debtor, when he obtains the benefit of the provisions of sect. 49 of the Act in respect of debts from which he is discharged, should at the same time feel the burden of those to which he is left liable? Why, on the other hand, should the trust or fraud creditor be remitted to the close of the liquidation for a remedy attaching to assets which are freed from the liquidation, and which, if he is delayed in asserting his rights, may be squandered by the debtor, or be seized by fresh creditors, asserting and enforcing subsequently acquired claims? It has been urged upon us that, during the continuance of the liquidation proceedings, the debtor ought to be relieved from the harassment of legal proceedings, so as to enable him to give his time and attention to the winding-up of his estate. But that contention can have no real force when urged in reference to a period of time at which admittedly the debtor is free to embark in new business, and to render himself liable to legal proceedings in respect of newly incurred liabilities.

A more plausible argument has been founded upon the wording of sect. 15 of the *Debtors Act,* 1869, which is in these terms: "Where a debtor makes any arrangement or composition with his creditors under the provisions of the *Bankruptcy Act,* 1869, he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the arrangement or composition he obtained forbearance, by any fraud, provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his debt and accepting divi-

(1) Law Rep. 10 Ch. 479.

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dends." It is said that the creditor in respect of a debt incurred by means of a fraud is, by virtue of that section, limited, as regards his right of action, to the unpaid balance of his debt; and that, consequently, he must wait until the close of the liquidation in order that that balance may be ascertained. There are manifest objections to this reading of the section. In the first place, the section does not deal at all with debts or liabilities incurred by means of a breach of trust, and yet they are, by sect. 49 of the *Bankruptcy Act*, put in the same category with debts or liabilities incurred by means of fraud; and are, so far as that Act is concerned, obviously intended to be dealt with in the same way. And, in the second place, it leaves even debts or liabilities incurred by means of fraud untouched in the case of a bankruptcy, as opposed to a liquidation by arrangement or composition. No reason has been suggested why this distinction should be made. On the other hand, it has been pointed out that there are matters untouched by the *Bankruptcy Act* to which the section under consideration might be applied. It is said that it relates, not to liquidations by arrangement under sect. 125 of the *Bankruptcy Act*, but to arrangements made by a bankrupt with his trustee, such as are referred to and made valid and binding upon creditors in and under the provisions of sect. 28 of that Act. This view derives force from the use by the draftsman of the expression, "Where the debtor makes any arrangement," which is contrasted with the expression, "liquidation by arrangement" used in the preceding section of the *Debtors Act*, and is scarcely appropriate to such a mode of winding-up the debtor's affairs. It is further strengthened by the consideration that the *Bankruptcy Act* does not contain any clause by which arrangements under sect. 28, and compositions under that section or under sect. 126, are affected in any way similar to that prescribed in reference to bankruptcies and liquidations by arrangement by sect. 49 of the Act. It is, however, unnecessary for us in this case to define the full force and meaning of sect. 15 of the *Debtors Act*, or to decide that liquidations by arrangement are necessarily excluded from its scope; it is sufficient for us to say that its terms are not such as to require us to hold, and we cannot hold, that it qualifies or limits, in the case of a liquidation by arrangement, and in respect of a debt incurred by means of a

fraud, rights which, in the case of a bankruptcy in respect of such a debt, and in the case both of bankruptcy and liquidation by arrangement in respect of a debt incurred by means of a breach of trust, the *Bankruptcy Act*, in our opinion, most clearly gives. If the creditor has accepted dividends the debtor will only remain liable for the unpaid balance of the debt; if no dividends have been paid the creditor may sue for the whole of the debt, but the debtor will not ultimately be damnified beyond what the *Bankruptcy Act* contemplates. For he is, of course, entitled to have set apart, in the name of his trust or fraud creditors, *pari passu* with the ordinary creditors, dividends under the liquidation, and, if he has paid any one of such trust or fraud creditors in full, he is entitled to stand in his place, and to receive the dividends set apart for that particular creditor. He, in the result, pays out of assets freed from the liquidation no more than the balance of the debt. The rights of the general body of creditors are, at the same time, in no way interfered with. For these reasons we are of opinion that there was no sufficient ground for restraining the Appellant's proceedings, and that this appeal must therefore be allowed.

Solicitors for Appellant: *Harper, Broad, & Battcock.*
Solicitor for Debtor: *H. W. Chatterton.*

In re DIAMOND FUEL COMPANY.

METCALFE'S CASE.

Company—Winding-up — Director — Misfeasance — Gift by Vendor of fully paid-up Shares—Estimate of Value—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 165.

The vendor of property to a company gave to one of the directors a number of shares, part of some which had been allotted to him as fully paid up in payment of the purchase-money of the property. With respect to some of these shares it had been stipulated that the company should retain the certificates for two years. At the commencement of the winding-up of the company some of the shares so given remained registered in the director's name, and the rest had been transferred by him, some for value, others for a nominal consideration. There was evidence that the public had subscribed for the ordinary shares of the company at their par value:—

Held (affirming the judgment of *Fry*, J.), that the director had been guilty

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of a misfeasance in relation to the company, and that he must pay to the liquidator the full nominal value of all the shares which had been given to him, and that there was no distinction between those shares the certificates of which were to be retained for two years and the others.

THE *Diamond Fuel Company* was incorporated by registration on the 27th of January, 1873, with a nominal capital of £200,000, divided into 40,000 shares of £5 each, to purchase and work certain patents.

By the articles of association it was provided that the company should adopt the agreement set forth in the schedule thereto, subject to any modification thereof which might from time to time be made by the directors, and that the capital should consist of 40,000 shares, including the vendors' shares under the agreement.

The agreement set forth in the schedule was dated the 15th of November, 1872, and was made between *D. Barker* and *T. D. Clare* of the one part, and *F. L. Price*, a trustee for the then intended company, of the other part. By it *Barker* and *Clare* agreed to sell certain patents and other property to the company for £15,000 in cash and the allotment to them of 8200 fully paid-up shares in the company of the nominal value of £41,000, but it was agreed that the certificates for 5600 of these shares should not be delivered to *Barker* and *Clare*, but should be retained in the hands of the company for two years from the date of its incorporation; but those shares were to be entitled to a dividend so soon as a dividend of 10 per cent. should have been paid for one year on the amount for the time being credited as paid up on all the other shares in the capital of the company for the time being. The cash and shares were to be paid and allotted to *Barker* and *Clare* in equal proportions. *Barker* and *Clare*, respectively, were, if they should so desire, to be directors of the company for the first three years after the allotment of shares in the company, provided that during that period they respectively remained holders of shares to the amount of £5000.

The articles also provided that, subject to any modification of the scheduled agreement by the directors, by a contract or contracts duly filed with the Registrar of Joint Stock Companies, the 8200 shares to be issued to *Barker* and *Clare* under the agreement should be deemed to be fully paid-up shares, and that the

articles should operate as a contract under sect. 25 of the *Companies Act*, 1867, and indemnify the holders of such shares from any liability to pay the amount thereof in cash. It was also provided that the number of directors should not be less than five nor more than nine, in addition to *Barker* and *Clare*, if and so long as they should be and remain directors in pursuance of the agreement. And the articles nominated five persons as the first directors of the company (in addition to *Barker* and *Clare*), one of whom was *W. B. Mitcalfe*. *Mitcalfe* had signed the memorandum of association for 200 shares. He continued to be a director of the company until the 1st of February, 1879, when a compulsory winding-up order was made.

At a meeting of the directors on the 4th of March, 1873, a resolution was passed which stated that the solicitor presented the assignment of the patents, containing the covenant of the company to allot the vendors' shares, executed by *Barker* and *Clare*, and it was resolved that this document should be sealed with the company's seal. The £15,000 agreed to be paid to *Barker* and *Clare* was paid to them out of the company's moneys by three cheques respectively on the 4th of March, the 5th of April, and the 27th of May, 1873. The 8200 fully paid-up shares were allotted on the 4th of March, 1873,—4100 to *Barker* and 4100 to *Clare*. On the 5th of March, 1873, *Barker* transferred 155 of his shares, and on the 22nd of April, 1873, he transferred 15 more of his shares to *Mitcalfe*, in each case for a nominal consideration. On the 5th of March, 1873, *Clare* transferred 925 of his shares, and on the 22nd of April, 1873, he transferred 15 more of his shares to *Mitcalfe*, in each case for a nominal consideration. The whole of the shares thus transferred, 1110 in number, were registered in *Mitcalfe's* name. He never paid anything in respect of them to the company. 855 of them remained registered in his name at the commencement of the winding-up; the remaining 255 he had transferred to other persons before the winding-up, some for value, and the rest for a nominal consideration.

The liquidator took out two summonses, one relating to the 855 shares, and the other relating to the 255, asking in each case that *Mitcalfe* might be ordered to pay the full nominal value of the shares.

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There was evidence that the ordinary shares of the company had been allotted to the public who applied for them, at their par value.

On the first summons,

FRY, J., held that *Mitcalfe* was liable to pay the full nominal value of the shares which remained standing in his name.

On the second summons,

Seward Brice, for the official liquidator:—

The case is governed by *De Ruvigne's Case* (1) and *Pearson's Case* (2). There is no distinction between the shares which *Mitcalfe* transferred for a nominal consideration and the others. He ought to pay as damages the full nominal value of all the 1110 shares. As was said by Lord Justice *Mellish* in *Carling's Case* (3), the company are entitled to say to *Mitcalfe*, "Although you have made no profit by selling these shares, yet, by having had them allotted to you, you have deprived us of the power of allotting them to other persons, therefore you must pay us the sum which we have lost by reason of our being deprived of the right of allotting those shares to other persons who would have paid them up."

Everitt, for *Mitcalfe*:—

I admit that *Mitcalfe* is liable for the shares which he transferred for value. But, as to those which he transferred for a nominal consideration, the company, through their directors and officers, knew of and sanctioned the transfers, and they are estopped from saying that *Mitcalfe* derived any profit from those shares. In fact he did not.

FRY, J.:—

A distinction is taken between the shares which were transferred for value and those which were transferred for a nominal consideration. But the shares, if they had not been given to *Mitcalfe*,

(1) 5 Ch. D. 306. (2) 5 Ch. D. 336.
(3) 1 Ch. D. 115, 126.

might have been allotted to the public. There is evidence that the public were giving the full nominal value for the shares, and there is nothing to shew that they would not have taken more. *Mitcalfe* must therefore be liable for the full nominal value of all the shares which he transferred.

From this decision *Mitcalfe* appealed. The appeal was heard on the 26th of November, 1879.

Everitt, for the Appellant:—

There is no decided case which establishes that where a director has received shares as a gift and has transferred them without making any profit, he is to be made liable for the value.

But there is another peculiarity in this case, namely, that some of the shares that *Mitcalfe* had and parted with may have been shares which the company were to keep back for two years. Therefore they were not marketable when *Mitcalfe* parted with them, and if he is to be charged with them he ought not to pay the full nominal value. Therefore I ask for an inquiry whether any of the shares were so circumstanced and what they were worth when he parted with them.

Seward Brice, for the official liquidator, was not called on.

JESSEL, M.R.:—

It is quite plain that, the company having consented to the transfer of these shares to Mr. *Mitcalfe*, he had full dominion over all of them, and was at liberty to obtain the value of them: and he did, in fact, sell some of them. I think he has been properly charged with all of them. I may add, that the obligation was on him to shew that, by reason of special circumstances, he was not chargeable with the full value of any of the shares, and he has not discharged that obligation.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitor for *Mitcalfe*: *T. F. Allingham.*
Solicitor for the Official Liquidator: *E. Beall.*

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GIRVIN *v.* GREPE.

[1879 G. 168.]

Practice—Rules of Court, 1875, *Order* XIV., *r.* 1*a*—*Summons to sign Judgment —Admitting Affidavit of Plaintiff in Reply to Defendant's Affidavit.*

Upon an application by the Plaintiff by summons, under Rules of Court, 1875, Order XIV., rule 1a, for leave to sign final judgment, the Court will allow the Plaintiff to read an affidavit made by him in reply to the Defendant's affidavit.

North Central Waggon Company v. *North Wales Waggon Company* (1) not followed.

ADJOURNED SUMMONS.

This action was commenced by a writ of summons specially indorsed with the particulars of a sum of £1205 7*s.* 6*d.* claimed to be due from the Defendants to the Plaintiffs.

The Defendants having appeared to the writ, the Plaintiffs took out a summons, under Rules of Court, 1875, Order XIV., rule 1a, that they might be at liberty to sign final judgment for the amount claimed, with interest. In support of the summons the Plaintiffs filed an affidavit stating that the Defendants were justly and truly indebted to them, and that they, the Plaintiffs, verily believed that the Defendants had no defence to the action.

The Defendants then filed affidavits in answer disputing the Plaintiffs' claim, and stating that under the circumstances therein specified they verily believed they had good defences to the action.

The Plaintiffs thereupon filed a long affidavit in reply tending to shew that the Defendants had in fact no defence to the action.

On the matter coming before the Chief Clerk, he declined to make any order on the summons, on the ground that the Defendants had, pursuant to Order XIV., rule 1a, sworn they had a good defence to the action. He also declined to receive the Plaintiffs' affidavit in reply, referring to *North Central Waggon Company* v. *North Wales Waggon Company* (1) as his authority for so doing.

The summons for judgment was then adjourned into Court.

(1) 39 L. T. (N.S.) 628.

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Chitty, Q.C., and *Dundas Gardiner*, for the Plaintiffs:—

Order XIV., rule 1a, under which this summons was taken out, is an extension of the principle embodied in the *Bills of Exchange Act*, 1855 (18 & 19 Vict. c. 67): *Wilson* on the Judicature Acts (1). To prevent judgment being signed against him under this rule, the Defendant has to satisfy the Court that he has a good defence to the action, or disclose such facts as may be deemed sufficient to entitle him to defend.

In the present case the Defendants no doubt purport to shew by their affidavit that they have a defence, but our affidavit in reply shews that in fact they have no defence at all. Under such circumstances, how can the Defendants say that they have "satisfied" the Court within the meaning of the rule? That an affidavit in reply to the Defendant's affidavit is admissible has been distinctly decided in *Davis* v. *Spence* (2), which we submit should be followed in preference to *North Central Waggon Company* v. *North Wales Waggon Company* (3). Even in cases under the *Bills of Exchange Act* itself leave to appear and defend the action will be rescinded if it be shewn that the defence *primâ facie* disclosed by the Defendant's affidavit does not exist: *Agra and Masterman's Bank* v. *Leighton* (4). We submit, therefore, that we are entitled to read this affidavit.

Roxburgh, Q.C., and *Romer*, *Davey*, Q.C., and *E. T. Holland*, for the Defendants:—

In the recent case of *North Central Waggon Company* v. *North Wales Waggon Company*, *Davis* v. *Spence* was discussed, but it was held, in direct opposition to that case, that an affidavit in reply by a Plaintiff proceeding under Order XIV. ought not to be received, since that would amount to trying the case upon affidavit. As Chief Justice *Cockburn* there points out, the procedure under this Order is the result of a very strong piece of legislation which, by giving the Plaintiff leave to sign judgment under the circumstances there stated, is an invasion of the Defendant's common law right to appear in Court and defend; and any condition limiting that right should be construed most strictly against the Plaintiff.

(1) 2nd Ed. pp. 133, 137, 170, 171.
(2) 1 C. P. D. 719.
(3) 39 L. T. (N.S.) 628.
(4) Law Rep. 2 Ex. 56.

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We submit, therefore, that this affidavit is not admissible upon this summons.

JESSEL, M.R.:—

The matter seems to stand in this way. The *Bills of Exchange Act*, after enacting that actions on bills of exchange may be commenced by writ of summons, goes on to say, in sect. 2, that the Judge shall give leave to appear and defend, on the Defendant paying the money into Court, "or upon affidavits satisfactory to the Judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Judge may deem sufficient to support the application"—and so on.

Now those are the words of the *Bills of Exchange Act;* and, under that Act, it was held not only that you might use affidavits in reply to the Defendant's affidavits, but that, even if leave had been given to defend, the Court would rescind the leave on further grounds being shewn, which is still stronger. That was decided in the case of *Agra and Masterman's Bank* v. *Leighton* (1).

Then we come to the Order XIV., rule 1a, which says that "the Court or a Judge may thereupon"—that is, upon the application for leave to sign final judgment—"unless the Defendant, by affidavit or otherwise, satisfy the Court or a Judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the Plaintiff to sign judgment accordingly."

That is to say, the order may be made "unless the Defendant, by affidavit or otherwise, satisfy the Court or a Judge that he has a good defence to the action." But how is he to satisfy the Court by an affidavit that he has a good defence, when the Plaintiff says, "That statement I can contradict by documents if you will allow me to produce them and verify them"? It seems to me a most extraordinary thing that the Judge is not to allow the Plaintiff, so to say, to state his case and verify it. What difference can it make whether he does so by affidavit in reply or by one of a bundle of affidavits brought in in the first instance? Whatever difficulty there may be in deciding the case, there is quite as much diffi-

(1) Law Rep. 2 Ex. 56.

culty in deciding it if the Plaintiff brings in all his affidavits in the first instance as if he brings in one or two of them in reply. If the objection is that you try the case in the one instance, the answer is, so you do in the other. It does not appear to me to be more difficult to try or less difficult to try, when the attention of the one side has been drawn to the affidavits of the other side.

Then, as to the objection itself, I think, with the greatest possible respect to the most recent decisions, it is not worth arguing. It is for the Judge to exercise a discretion. I entirely agree that he is not to try the action on affidavits alone; but the rule says, "or disclose such facts as may be deemed sufficient to entitle him to defend." Therefore, the real question is, not the immediate trial of the case, but whether there is such a *primâ facie* case that the Defendant ought to be allowed to have it tried—which is a totally different issue, and which not only can be well tried on affidavits, as we know by experience, but presents no difficulty (at least speaking for myself) in trying on affidavits. We know that nothing is more familiar to Chancery practitioners than trying such a question on affidavits; because it is, in fact, the issue in every case of interlocutory injunction: the real issue is, Has the Defendant shewn such a *primâ facie* case as to entitle him to be let in to defend?

As regards the decisions, I agree they are entirely contradictory to each other. There is, first of all, the decision of the Court of Common Pleas in *Davis* v. *Spence* (1), in which Justices *Brett*, *Grove*, and *Lindley*, all agree that it is quite clear that the rule, in effect, adopts the practice under the *Bills of Exchange Act*, and that the leave to read the affidavit in reply was properly given; and they refused the motion to prevent the Plaintiff from signing final judgment.

On the other hand, we have the case of *North Central Waggon Company* v. *North Wales Waggon Company* (2), a more recent decision, and in which *Davis* v. *Spence* seems to have been cited. It was before Lord Chief Justice *Cockburn* and Mr. Baron *Pollock*. It is a distinct decision the other way.

Therefore, the result is, that the authorities are in conflict; and, being decisions of Courts of co-ordinate jurisdiction, I am not

(1) 1 C. P. D. 719. (2) 39 L. T. (N.S.) 628.

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bound by either of them. Still, though not strictly bound in any case by the decisions of Courts of co-ordinate jurisdiction only, I need not say that, if I found a Divisional Court, consisting of three Judges, deciding a point of practice in a Common Law action, I should follow it, although not strictly bound to do so.

But, there being here a direct conflict of authority, I must decide the question according to my own opinion: and I think that, looking at the language of the rule, and considering its object, and having regard to the practice under the *Bills of Exchange Act*, and in the Court of Chancery on interlocutory injunctions, there is no real difficulty in deciding whether or not the Defendant ought to be allowed to defend, after admitting affidavits in reply or in rejoinder to any extent that the Judge thinks it right to give leave; not forgetting that you may cross-examine a Defendant or call upon him to produce documents also, with a view to satisfying the mind of the Judge—which is a much stronger power than existed under the old Court of Chancery as regards injunctions.

Therefore, it does appear to me that the right course is, to admit the affidavit in reply to be read, and I so decide.

The case then having been argued on the affidavits, His Lordship held that there was no real defence to the action, and accordingly gave the Plaintiffs leave to sign judgment for the amount indorsed on the writ, with interest and costs.

Solicitors: *Linklater & Co.; Park Nelson, Ponsonby, & Gemmell; Crowder, Anstie, & Vizard.*

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[1875 B. 272.]

Settled Estate—Tenant for Life—Equitable Waste—Ornamental Timber—Right to cut—Timber Inquiry.

An equitable tenant for life, unimpeachable for waste, is entitled to the proceeds of ornamental timber cut by him, where the timber so cut is such as the Court would itself direct to be cut for the preservation and improvement of the remaining ornamental timber: but it does not follow that the Court will not, at the instance of the remainderman, grant an injunction restraining the tenant for life from cutting any ornamental timber which it has become necessary and proper to cut, and direct that the cutting be done under its supervision.

The doctrine of equitable waste considered.

Form of inquiry as to ornamental timber.

SIR *THOMAS GAGE SAUNDERS SEBRIGHT*, by his will, dated in 1851, devised his real estate, including his "*Beechwood* estate" in *Hertfordshire*, to trustees in fee, in trust for his son the Defendant Sir *John Gage Saunders Sebright* and his assigns for his life, without impeachment of waste; and after his decease in trust for his first and other sons successively in tail male, with remainders over.

The testator died in 1864, whereupon the Defendant Sir *John G. S. Sebright* became, under the provisions of the will, equitable tenant for life in possession of the *Beechwood* estate. At that time there was standing on the estate a large quantity of very valuable timber, of which part was "ornamental," and part had been planted or left for ornament and shelter.

Since he had come into possession of the estate the Defendant had cut a considerable amount of timber thereon, and sold the same for sums amounting to upwards of £21,000, which, after deducting the cost of cutting, he had applied to his own use.

The Plaintiffs, the present trustees of the will, alleged that some of the timber so cut and sold by the Defendant was ornamental timber, and timber planted or left for ornament or shelter, which he, as tenant for life, was not entitled to cut; and they accordingly filed the bill in this action praying (1) that, so far as might be necessary, the trusts of the will, so far as the same related to the

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timber formerly standing and then standing on the *Beechwood* estate, might be carried into execution by and under the direction of the Court: (2) a declaration as to the extent of the rights of the Defendant Sir *John G. S. Sebright*, as equitable tenant for life without impeachment of waste under the will, to cut timber on the *Beechwood* estate: (3) an account of the ornamental timber and of the trees planted or left standing for ornament or shelter upon the *Beechwood* estate (if any) which had been felled or sold by or under the direction of the said Defendant, and also an account of the moneys produced by the sale thereof: (4) that the said Defendant might be ordered to pay to the Plaintiffs or into Court for investment such sum (if any) as upon the result of the accounts aforesaid ought to be so paid, and that all proper directions might be given as to the investment and application of the fund: and consequential relief.

Sir *John G. S. Sebright's* eldest and only son, an infant, was made co-Defendant with his father.

The Defendant Sir *John G. S. Sebright*, by his answer, admitted that the greater part, if not the whole, of the trees felled by him came within the description of ornamental timber, but stated that it had become absolutely necessary to fell them for the purpose of thinning out, and for the preservation and improvement of other trees of a more ornamental character: also that many of the trees so felled had stood in such close proximity to the mansion-house and other buildings on the estate as to be injurious to the health of their inmates. He further stated that he had acted throughout for the permanent advantage of the estate and under the advice of surveyors and woodmen of experience: and he submitted that under the circumstances, and having regard to the care and precautions which had been taken before any of the timber was cut, and to the fact that he was tenant for life without impeachment of waste, he was entitled to cut all the timber which had been so cut by him. He moreover submitted to account if the Court should be of opinion that he had exceeded his rights as such tenant for life.

By the decree, dated the 20th of November, 1876, made on the trial of the action, it was declared that the Defendant Sir *John G. S. Sebright*, as equitable tenant for life without impeachment

of waste, was entitled to cut all such trees on the *Beechwood* estate as were fit to be cut, except trees planted or left standing by any predecessor in title of the said estate for ornament, protection, or shelter: and, the Defendant undertaking not to cut any of the trees on the *Beechwood* estate so planted or left standing, an inquiry was directed in the following form: "An inquiry whether any and what trees planted or left standing by any predecessor in title of the *Beechwood* estate or any part thereof for ornament, protection, or shelter, had been cut by the Defendant Sir *John G. S. Sebright*, and under what circumstances the same were cut, and particularly whether any and which of such trees injured or impeded the growth of any other trees adjoining or near thereto which were of so much importance for the purposes of ornament, protection, or shelter, as that the removal of the trees so cut was essential for such purposes of ornament, protection, or shelter; and whether any and which of such trees cut by the Defendant Sir *John G. S. Sebright* were prejudicial to the health of the inmates of the mansion-house or the inmates of any other building on the estate, or interfered with the comfortable enjoyment of the mansion-house or any other building on the estate." And an account was directed of the value of any trees improperly cut.

In answer to the first inquiry, the Chief Clerk certified as to the number and description of trees cut by the Defendant Sir *John G. S. Sebright:* and that "all the trees so cut were injurious to or impeded the growth of other trees adjoining or near thereto which were of so much importance for the purposes of ornament, protection, or shelter as that the removal of the trees so cut was essential for such purposes of ornament, protection, or shelter;" also that no trees planted or left standing by any predecessor in title of the *Beechwood* estate or any part thereof for protection or shelter had been cut by the Defendant.

The evidence on the inquiry consisted principally of an affidavit by the agent and surveyor of the estate under whose advice the timber in question had been cut. The affidavit detailed the circumstances under which the timber had been cut, and corroborated the statements in the Defendant's answer.

The action now came on upon further consideration, the question

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being whether the Defendant Sir *John G. S. Sebright* had, in cutting ornamental timber, been acting within his rights as an equitable tenant for life unimpeachable for waste, and was therefore entitled to retain the proceeds of such timber for his own use.

Chitty, Q.C., and *Bush*, for the Plaintiffs.

Davey, Q.C., and *Walter Morshead*, for the Defendant Sir *John G. S. Sebright*:—

We have been unable to find any direct authority on the point, either in the notes to *Garth* v. *Cotton* (1) or elsewhere; but, on principle, we submit that if ornamental timber is cut by a tenant for life unimpeachable for waste, *bonâ fide* for thinning, and for the preservation and improvement of the remaining ornamental timber, as in the present instance, that does not constitute equitable waste, and he is therefore not accountable for the profits: *Lord Mahon* v. *Lord Stanhope* (2); for he is only doing what the Court itself would order to be done: *Lushington* v. *Boldero* (3); *Ford* v. *Tynte* (4). So long, then, as the tenant for life cuts rightfully his legal rights will remain undisturbed. The whole foundation of the doctrine of equitable waste is an unconscientious or malicious use of the legal power: thus, if a tenant for life unimpeachable for waste is committing acts destructive to the inheritance, or of wanton or malicious mischief, the Court holds that his legal power to commit waste is being used unconscientiously, and will interfere to restrain him: *Micklethwait* v. *Micklethwait* (5); *Vane* v. *Lord Barnard* (6); *Rolt* v. *Somerville* (7).

[JESSEL, M.R.:—It is singular that there does seem to be no express decision on the present point.

Bush:—The point is touched upon by Mr. *Giffard* in his arguments in *Ford* v. *Tynte* (8).

JESSEL, M.R.:—I see that Mr. *Yool*, in his work on Waste, says (9): "Ornamental timber may also be cut rightfully;" and

(1) 1 Wh. & Tud. L. C. 5th Ed. p. 751.
(2) 3 Madd. 523, n.
(3) 6 Madd. 149.
(4) 2 D. J. & S. 127, 129.
(5) 1 De G. & J. 504, 524.
(6) 2 Vern. 738.
(7) 2 Eq. Cas. Abr. 759.
(8) 2 D. J. & S. 129, 130.
(9) Page 49.

then he says (1), "As the equitable restraint upon a tenant for life without impeachment of waste is only to prevent him from making an unconscientious use of his legal power, there seems to be ground for contending that the property in all timber rightfully cut, whether ornamental or not, vests in him in equity as well as at law" (2).]

The authorities go to shew that so long as the tenant for life does not abuse his legal right, a Court of Equity will not interfere with its exercise. Where ornamental timber has been wrongfully cut by a tenant for life without impeachment of waste, it has been held that the proceeds belong to the first owner of the inheritance: *Butler* v. *Kynnersley* (3); *Rolt* v. *Somerville* (4).

[JESSEL, M.R.:—I see that Mr. *Yool* remarks in his work on Waste (5), that in other cases it has been held that the proceeds follow the uses of the settlement.

Chitty, Q.C.:—In *Lowndes* v. *Norton* (6) the proceeds were held to belong to the next tenant for life unimpeachable for waste. But in *Honywood* v. *Honywood* (7) your Lordship held that where timber is cut in the course of proper management the proceeds should be invested and the income given to the successive tenants for life until there is an absolute estate of inheritance.]

But if the tenant for life who has wrongfully cut timber claims the proceeds in the character of the next owner of the inheritance, as where he has the ultimate remainder in fee subject to intervening contingent estates, he is not entitled to any benefit in the money, as he would be thereby taking advantage of his own wrong: *Williams* v *Duke of Bolton* (8).

A. Rumsey, for the Defendant, the infant remainderman.

JESSEL, M.R.:—

I wished this point to be discussed, and I regret it has not been argued more hostilely than it has been, because the point is one of

(1) Page 50.
(2) See *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. & Sm. 75, 76, 79.
(3) 7 L. J. (Ch.) 150; 8 L. J. (Ch.) 67.
(4) 2 Eq. Cas. Abr. 759.
(5) Pages 45, 48.
(6) 6 Ch. D. 139.
(7) Law Rep. 18 Eq. 306.
(8) 1 Cox, 72; 3 P. Wms. 268, n.

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some importance, and does not appear to have been the subject of direct decision.

An equitable tenant for life unimpeachable for waste cut ornamental timber, and he alleged that he cut it, not only properly, but beneficially for the ornamental timber which remained; and accordingly an inquiry was directed in this form:—[His Lordship read it, and continued:—] I need not trouble myself about the last part of the inquiry, because the first part of it has been answered in favour of the tenant for life; that is, in effect, that the trees which he did cut injured or impeded the growth of other trees which were of essential importance for ornament or shelter: in other words, he did that which the Court directed to be done in the cases of *Lushington* v. *Boldero* (1) and *Ford* v. *Tynte* (2). It seems that the trees cut were of considerable value, and of a value very much in excess of the cost of cutting; that is admitted; and consequently there was a considerable sum arising from the proceeds of the sale of the timber cut which went into the pocket of the tenant for life.

The question I have now to decide on further consideration is, whether the equitable tenant for life unimpeachable for waste is entitled to retain the proceeds of the timber so cut for his own use. If he is not, a second question arises which otherwise it is not necessary to discuss.

The point, as I said before, does not appear to have been directly decided; but, from the cases I am about to refer to, it seems to have been indirectly decided or assumed in favour of the tenant for life; and in deciding it, apparently for the first time, I have no hesitation in saying that, looking at the principles which have been laid down by the Court of Chancery as, so to say, the ground of its interference with the tenant for life in respect of what is commonly called "ornamental timber," that is, timber planted for ornament or shelter, it is impossible to hold that this tenant for life ought to be interfered with at all; that is to say, his rights, such as they would have been had the timber not been ornamental, remain unaffected by what has occurred.

The way to look at the matter is this: Courts of Equity restrained a legal tenant for life unimpeachable for waste from

(1) 6 Madd. 149. (2) 2 D. J. & S. 127, 129.

committing some kinds of waste which are called equitable waste. Why? Because it was considered that, though he had legal powers, he was not using them fairly—he was abusing them so as to destroy the subject of the settlement. That was the only ground, as it was said. Sometimes he was making an unconscientious use of his powers; and in fact the first case on the subject, the case of *Lord Barnard* (1), who, to spite the remainderman, took off the roof of *Raby Castle*, was a very striking case of the unconscientious use of those powers.

It does appear to me that the ground stated for the Court's interference quite represents the true view of the matter. The Court of Equity did interfere by injunction to restrain the act of the tenant for life, because it was an unconscientious use of his powers; and therefore, unless the Court of Equity would restrain a tenant for life from doing the act, it ought not to deprive him of the proceeds of doing it, if what he was doing was not wrongful. The legal result of his act would follow in the same way as if no such doctrine as equitable waste were known: in other words, in the case put, he rightfully cuts the timber; and really it comes to that point. Now if he rightfully cuts the timber, it must be plain that that cannot be called an unconscientious use of his powers, because he is doing that which not only the Court itself would allow, but by established rule will now direct to be done: and it seems to me impossible to say, when he has done that which was necessary, so to speak, in order to preserve the remaining timber for the purpose for which it was planted, that what he has done was improperly done. That does not necessarily refer to decaying timber that may be ornamental, and which the Court may order to be cut on the balance of convenience, since it orders it when the tenant for life is impeachable for waste, in the ordinary course of management, and then the proceeds are invested for the benefit of the estate. It may be prudent to cut timber which is decaying, when to do so is beneficial for all parties, and when the Court has them all before it, although there is no absolute right to cut it, because it is ornamental timber. As we all know, there are oaks and other trees which will decay for centuries and still be ornamental. Therefore what I am saying does not necessarily apply

(1) 2 Vern. 738.

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to decaying timber, but it does apply to a case where the timber cut is impeding the growth of what I will call more ornamental timber; there cutting is the right thing to do.

Now, on looking at the authorities (I do not think it is necessary to cite many of them) this seems very plain. I will first take the passage in the carefully considered judgment of Lord Justice *Turner* in *Micklethwait* v. *Micklethwait* (1), where he says (2): "This doctrine of equitable waste, although far too well settled in this Court to be now in any way disturbed, is (it is to be observed) an encroachment upon a legal right." I do not much admire that term "encroachment," because almost all the doctrines of equity were interferences with a legal right, and that term is rather a term of opprobrium when it ought to be a term of praise. The interference of Courts of Equity with legal rights was for the improvement of the law and the furtherance of justice, and therefore to say that a doctrine of equity is an "encroachment" on a legal right is simply to censure the whole doctrine of equity.

Then his Lordship says, "At law a tenant for life without impeachment of waste has the absolute power and dominion over the timber upon the estate, but this Court controls him in the exercise of that power, and it does so, as I apprehend, upon this ground, that it will not permit an unconscientious use to be made of a legal power. It regards such an unconscientious use of the legal power as an abuse, and not as a use of it. When, therefore, the Court is called upon to interfere in cases of this description, it is bound, I think, in the first place, to consider whether there are any special circumstances to affect the conscience of the tenant for life, for in the absence of special circumstances it cannot be unconscientious in him to avail himself of the power which the testator has vested in him."

It really comes back to this, that the Court of Equity considers that where the testator gives these powers to the tenant for life, he intends them to be used fairly. He is not to take the roofs off the houses to spite the remainderman, and not to cut down ornamental timber so as to destroy the amenity or beauty of the estate; but beyond that the Court of Equity does not interfere when he is doing what the settlor himself would have done with a

(1) 1 De G. & J. 504. (2) 1 De G. & J. 524.

view to preserve the beauty of the estate, though he obtains a profit. He is not acting unconscientiously.

I think the same result appears, although not quite so clearly, from the case of *Ford* v. *Tynte* (1). In the first place let us recollect what the case was. It was an appeal by the remaindermen from the order of Vice-Chancellor *Wood*, authorizing the receiver to cut certain timber which was said to be ornamental timber. The order was appealed from on the ground that the directions were not in the right form. It was said that they were too wide, and the Appeal Court was of that opinion, and varied Vice-Chancellor *Wood's* order. Now, how does the counsel for the remaindermen put it? Mr. *Giffard's* argument is this: "We say that if a group of trees is planted or left standing for ornament or shelter, none of the trees can be felled by a tenant for life except those the felling of which will improve others of them." That is, he can fell those. That is the argument of the counsel for the remaindermen; and then cases are cited, winding up with *Lushington* v. *Boldero* (2), which gives the proper form of inquiry.

Then the counsel for the Plaintiff, representing the tenant for life, said the remaindermen came too late; and they took another point, that there was no satisfactory evidence that the trees were ornamental. Then Mr. *Giffard* says in reply, "Those trees only ought to be cut the removal of which will be beneficial to other ornamental trees, and the reference ought to have been in such terms as to secure this." So he puts it that what the Court will cut the tenant for life may cut. That is what it comes to.

In delivering judgment, Lord Justice *Turner*, after going into the matter at considerable length, and saying he thought there must be a further inquiry (3), says "There is not, so far as I can find, any settled form of inquiry applicable to all cases of this description, nor do I think that there can be; for the question to what extent ornamental timber may be cut, must, as I apprehend, depend upon the circumstances of each particular case, and the proper inquiry to be directed must vary accordingly." Then he goes into the case before Lord *Eldon*, and makes a special form

(1) 2 D. J. & S. 127. 10 Jur. N.S. 429 (2) 6 Madd. 149.
(3) 2 D. J. & S. 133. 10 Jur. N.S. 431

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of inquiry very much in the shape of the inquiry in the case before me.

Now, looking at those two decisions of Lord Justice *Turner*, there can be no doubt whatever as to his opinion that the tenant for life could properly cut that which the Court itself would direct to be cut; that is, the Court would not do anything wrong. The very notion of preserving ornamental timber was the creation of the Court of Equity; and, therefore, in directing some portions of the timber to be cut down to save the rest, the Court was not contravening its own rules, but carrying them out, the intention of the testator being that, not all the ornamental timber, but as much of it as possible should be preserved, consistently with allowing the natural growth of the trees, and so far as they would not destroy one another. No Court of Equity or any other Court could control the operations of nature, and therefore the Court could not say that the whole of the ornamental timber should be preserved when the trees were growing so thickly as to destroy one another: but what it could do, and what it does do, is, to preserve it as far as possible.

If the tenant for life has done the same thing, and has only cut such of the ornamental trees as impeded the growth of the others, and such as were, as between the trees cut and those left standing, the most proper to be cut, how can I say he has acted unconscientiously or improperly? It seems to me I could not have granted an injunction against his doing this if he had shewn that what he intended to do was exactly what he has done; and that being so he is entitled to the proceeds.

I wish to guard myself against it being supposed that if the remaindermen had come to the Court before the tenant for life had cut any ornamental timber, I should not have granted an injunction. That raises a totally different question. Before the tenant for life cuts ornamental timber, it may be that the remainderman has a right to the protection of the Court of Equity to prevent his doing it improperly. The tenant for life may say, I do not intend to cut anything but what can properly be cut; but the remainderman can say, If you once cut down any of these ornamental trees I cannot put them up again: it may be an irremediable mischief: and, on the ground that the Court interferes

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to prevent irremediable mischief, it may be that when a tenant for life begins to cut ornamental timber, the Court will only allow him to cut under its direction and supervision, as in other cases of administration. It is not a question merely of his intending to do right; for, however good his intentions, the Court would see, in carrying out the trusts of the will or settlement, that right was done.

I am not saying that I should not interfere with a tenant for life who professed his intention of doing what was right, unless I was absolutely sure that he would do nothing else. I only say this because it might be thought, from the observations I have made, that the mere granting of the injunction would be a conclusive test as to his right to the proceeds. There may be cases where an injunction might be granted in which timber might be afterwards cut, and the tenant for life entitled to the proceeds even of timber so cut.

There will be a declaration that Sir *John Sebright* is entitled to retain the proceeds of the timber cut.

Solicitors: *Fladgate, Smith, & Fladgate; Tylee, Wickham, & Moberly.*

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Will—Construction—Gift to A. for Life, and at his Decease to such Persons as he shall Appoint—Power of Appointment by Deed or Will—Clear Gift followed by ambiguous Expression — Leaving Issue — Vested Interests—Marriage Settlement—Covenant to settle Wife's Property—"Beneficially Entitled"—Defeasible Reversionary Interest.

A gift by will to *A.* for life, and "at," or "after," his decease to such persons as he shall appoint, gives *A.* a life interest with a power of appointment either by instrument *inter vivos* or by will; there being no rule of construction under which a gift in such terms, unless controlled by the context, can be held to confer a testamentary power only.

Bequest of residue to *A.* for life, "the whole principal at her death to be divided amongst her children, if she has any, in such proportions as she shall think proper; and if she dies without leaving children," then over.

A. died without having exercised her power of appointment, and having had three children, of whom one only survived her:—

Held, that the three children took vested interests liable to be divested by

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the exercise, either by instrument *inter vivos* or by will, of *A.*'s power of appointment; and accordingly that on *A.*'s death the residue became divisible in equal thirds between the surviving child and the representatives of the two deceased children.

By an ante-nuptial settlement the husband and wife, after settling certain trust funds belonging to the wife, covenanted with the trustees "that if at the time of the solemnization of the intended marriage the wife shall be, or if at any time thereafter, and during the joint lives of the husband and wife, she, or her husband in her right, shall become beneficially entitled to any real or personal property, estate or effects, for any estate or interest whatsoever, then and in every such case the husband and wife and all other necessary parties shall, as soon as circumstances will permit," assure such property and effects to the trustees in trust for sale, and to hold the proceeds upon the trusts thereinbefore declared of the wife's trust funds, "or as near thereto in all respects as the deaths of parties and other circumstances will admit":—

Held, that a reversionary interest in personalty vested in the wife at the date of the marriage, but liable to be divested by the exercise of a power of appointment, was included in the covenant.

In re Mackenzie's Settlement (1) considered.

Sweetapple v. *Horlock* (2) corrected.

MRS. *MASSEY JACKSON*, widow, who died in 1826, by her will, dated in 1824, after sundry bequests, bequeathed the residue of her property, as to the interest thereof, to her daughter *Margaret Elizabeth*, the wife of *Richard Mansel Oliver Massey*, for her sole use and benefit: should she outlive her aunts and uncle *Thomas*, "the whole principal at her death to be divided amongst her children, if she has any, in such proportions as she shall think proper; and if she dies without leaving children, the whole to go at her death to her uncle and aunts, should any or either of them be living, in equal proportions."

The testatrix's daughter, Mrs. *Oliver Massey*, survived her uncle and aunts. She had three children; two died in 1830 and 1865 respectively, and the third, *Madeline Elizabeth Oliver Massey*, in 1854, married *Thomas Bowen Sheriffe*.

The settlement made prior to that marriage, dated the 23rd of May, 1854, after reciting (amongst other things) an agreement that the intended husband and wife "should enter into such covenant for the settlement of such other or future property" of the wife "as hereinafter is contained," proceeded to settle certain trust funds belonging to the wife, and then contained a covenant by the intended husband and wife with the trustees, "That if at

(1) Law Rep. 2 Ch. 345. (2) 11 Ch. D. 745.

the time of the solemnization of the said intended marriage the said *M. E. Oliver Massey* shall be, or if at any time thereafter, and during the joint lives of them the said *T. B. Sheriffe* and *M. E. Oliver Massey*, she the said *M. E. Oliver Massey*, or she and the said *T. B. Sheriffe* in her right, shall become beneficially entitled by descent, transmission, devise, appointment, gift, representation, or otherwise, to any real or personal property, estate, or effects, of the value at one time of upwards of £1000 sterling, for any estate or interest whatsoever," except jewels, &c., and the property thereby settled, and any property effectually settled to the wife's separate use, "then and in every such case they the said *T. B. Sheriffe* and *M. E. Oliver Massey*, and their respective heirs, executors or administrators, and all other necessary parties, shall and will, at the costs of the said trust estate, as soon as circumstances will permit, and to the satisfaction of the trustees or trustee for the time being of these presents, convey, assign, surrender, and assure so much and such parts of such real and personal property and effects (other than and except as aforesaid) as shall exceed the value of £1000 sterling, or otherwise cause the same to be vested in the trustees or trustee for the time being of these presents, their or his heirs, executors, and administrators respectively, according to the nature thereof, upon trust that they or he do and shall with all convenient speed, and in such manner as they or he shall think fit, sell or call in or convert into money such part or parts of the said property as shall not consist of any annuity or annuities or other real or personal estate to which the said *M. E. Oliver Massey*, or she and the said *T. B. Sheriffe* in her right, shall so be or shall so become entitled as aforesaid for the life of her the said *M. E. Oliver Massey*, or for any term of years or other interest determinable on her decease," and should stand possessed of the proceeds of such sale upon the trusts thereinbefore declared of the wife's trust funds, "or as near thereto in all respects as the deaths of parties and other circumstances will admit."

T. B. Sheriffe died in 1864, and in 1865 his widow married Colonel *Bagot Chester*, a settlement being made upon the marriage whereby the husband and wife covenanted for the settlement of property beyond £1500 acquired by the wife, or her husband in her right, during the coverture.

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Mrs. *Oliver Massey* survived her husband, and died on the 31st of October, 1878, without having exercised the power of appointment given to her by her mother's will.

Upon Mrs. *Oliver Massey's* death, the trustees and executors of her mother's will being in doubt as to who were the persons entitled under the residuary gift therein contained, paid the sum of £8221 6*s.* 11*d.*, representing the residue, into Court under the *Trustee Relief Act.*

A petition presented by Colonel and Mrs. *Bagot Chester* for payment out of the fund raised the following questions: 1. Whether upon the construction of Mrs. *Massey Jackson's* residuary bequest, each of Mrs. *Oliver Massey's* children had acquired a vested interest in one-third of the fund; or, 2, whether the gift did not vest until Mrs. *Oliver Massey's* death, in which case Mrs. *Bagot Chester*, as her only child then living, would take the whole; and, 3, whether Mrs. *Bagot Chester's* interest, whatever it was, in the fund, beyond £1000, was bound by the covenant in her first marriage settlement.

Ince, Q.C., and *Herbert Lake*, for the Petitioners:—

Upon the first and second questions we submit that Mrs. *Bagot Chester*, as Mrs. *Oliver Massey's* only surviving child, takes the whole fund.

It is clear upon the language of the will that the only gift to Mrs. *Oliver Massey's* children is by implication, that is, through the medium of the power in conjunction with the reference, in the gift over, to the objects of the power; and consequently, the power not having been exercised, no child took who could not have taken under the power. The question then arises, was this power exerciseable by deed or writing *inter vivos*, or by will only? If the latter, then Mrs. *Bagot Chester* takes the whole, as having been the sole object of the power at the death of the donee of the power, and this is the view for which we contend. The decisions are, we admit, conflicting, but the balance appears to be in our favour. The authorities supporting our contention are *Kennedy* v. *Kingston* (1); *Woodcock* v. *Renneck* (2); *Reid* v. *Reid* (3); *Free-*

(1) 2 Jac. & W. 431. (2) 4 Beav. 190; 1 Ph. 72.
(3) 25 Beav. 469.

land v. *Pearson* (1); and observations in the judgment in *Lambert* v. *Thwaites* (2). The authorities against us are, *Sugden* on Powers (3); *In re Davids' Trusts* (4); *Humble* v. *Bowman* (5); and the reasoning in the judgment in *In re Mortlock's Trust* (6). Moreover the testatrix shews an intention that only the child or children surviving the tenant for life should take; for the word "leaving" should be construed in its literal sense.

Chitty, Q.C., *Parke*, and *Sladen*, for the legal personal representatives of Mrs. *Oliver Massey's* two deceased children, were not called upon.

JESSEL, M.R.:—

There is no principle of law that I am aware of compelling me to alter the plain words of a will as regards a power of appointment simply because the power refers to a reversionary interest.

To put the case as it has actually occurred—a gift to *A.* for life and "after his decease," or "at his decease," to such persons as *A.* shall appoint, does not mean as *A.* shall appoint by will only, or by testamentary instrument only. The words are general; and being general, what right has the Court to insert restrictive words simply because what is to be appointed is a reversionary interest?

Supposing the gift were to *A.* for life and "at," or "after," his decease to such persons and in such manner as *B.* should appoint. No one could say that because there was a previous life interest in *A.* that *B.'s* power was otherwise than general. Why should the fact of the appointor being tenant for life make any difference? How can you read the words otherwise? It does not appear to me, when you come to consider it, that it is possible to lay down any such rule of construction: it does not exist. No doubt you may find from other expressions in the will that the words "as *A.* shall appoint" are to be restricted to this—as *A.* shall appoint by testamentary instrument or by will or codicil. That you may find expressions in the will creating such a restriction I do not deny for a moment: but then it is purely a question of construction ot

(1) Law Rep. 3 Eq. 658.
(2) Ibid. 2 Eq. 155.
(3) 8th Ed. p. 210.
(4) Joh. 495.
(5) 47 L. J. (Ch.) 62.
(6) 3 K. & J. 456.

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the particular will. In this particular instance it is the simplest thing in the world. [His Lordship then, after reading and commenting on the words of the gift, continued:—] I see no reason in the world for restricting the words to a testamentary power, and I am clearly of opinion that I am not bound by authority or by any supposed rule of construction so to restrict them, and that the general and well-established rules of construction must prevail, that words are to have their literal meaning and force given to them unless you find the context overruling it. Here, not only have the words the wider meaning, but I should say it is the more sensible meaning.

It has been said that when words are ambiguous you are to take that which is the more sensible, and more useful and convenient meaning. I do not think that the words here are ambiguous; but even if they were, it is much more useful that the parents should have the power to appoint by instrument *inter vivos*, because a parent can then make a provision for children, say for daughters on their marriage, which the parent is unable to make if the power is testamentary only.

Therefore every reason of convenience and usefulness points to the general power; but, as I said before, it is not necessary to resort to that because there are no expressions in the will to the contrary.

Then there was the argument about the gift over—if Mrs. *Oliver Massey* "dies without leaving children" the whole is to go over. It is not necessary to decide this point, but it seems to me to be a mere alternative gift. The first is that if she has children it is to be divided. No doubt here is a second; but the rule is that a clear gift to children, or to anybody else, is not to be cut down by the words "without leaving," if they can mean properly "without having" (1). It does not appear to me to be so cut down here; but it is not necessary in this case to decide the point, because, if I am right in the first construction, then there is certainly a gift to the children either directly, namely, to be divided amongst the children in such proportions, if any, as the mother shall think proper: that is to say, if she does not think proper at all, then they take equally: or it is a gift by implication to the children in default of appoint-

(1) See *White* v. *Hight*, 12 Ch. D. 751.

ment, because there is a gift over shewing that the others are to take, even on the view contended for on behalf of the Petitioners, if she left a single child. Consequently it follows that the children take equally.

As to the cases which have been cited, I do most strongly protest against cases of construction being cited to a Judge, unless those cases shew a principle by which he is bound. Mr. *Ince* admitted that those cases do not shew that; because there is a direct conflict of decisions, three on each side. Two there were on each side when Lord *Romilly* decided *Freeland* v. *Pearson* (1); and he decided one way, and the Vice-Chancellor *Hall*, in *Humble* v. *Bowman* (2), decided the other way. So that they are three and three. What is the use of citing them under those circumstances?

The third question then came on for argument, namely, whether, Mrs. *Bagot Chester* having had, at the time of her marriage, according to his Lordship's decision, a defeasible vested reversionary interest in one third of the fund, that interest was bound by the covenant in her first marriage settlement, and it was arranged that this question should be argued between the trustees of the two settlements.

Church, for the trustees of the first settlement, having submitted that the words of the covenant were sufficient to include the interest in question, was stopped by the Court.

B. B. Rogers, for the trustees of the second settlement:—

This was a contingent or defeasible interest only at the date of the first settlement, and such it continued during the whole of the coverture: it is therefore not bound by the covenant. Your Lordship will observe that the words are "beneficially entitled" only; differing from the usual form "entitled in possession, remainder or reversion, or otherwise howsoever." "Beneficially entitled" means "beneficially entitled in possession," and import a change of condition of the property during the coverture:

(1) Law Rep. 3 Eq. 658. (2) 47 L. J. (Ch.) 62.

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M'Lachlan v. *Taitt* (1); *In re Clinton's Trust* (2); *Archer* v. *Kelly* (3); *Hughes* v. *Young* (4).

In *Atcherley* v. *Du Moulin* (5) Vice-Chancellor *Wood* held that a similar covenant did not include a contingent interest, and Lord *Romilly* so held in *Dering* v. *Kynaston* (6), where it was distinctly decided that such a covenant included only indefeasibly vested interests.

[*Church*:—In *Agar* v. *George* (7) Vice-Chancellor *Malins* disapproved of *Dering* v. *Kynaston*.

Jessel, M.R.:—*Dering* v. *Kynaston* is a very peculiar case. There the wife had an estate tail in remainder after other estates tail, and her interest happened to be a very remote one indeed. It was not a contingent interest, but a vested estate tail in remainder after the failure of several prior estates tail; and in the events which had happened it was most improbable that she would ever come into possession. That may have influenced Lord *Romilly's* decision.]

The case has never yet been overruled, and *Agar* v. *George* cannot be said to be directly opposed to it.

[Jessel, M.R.:—It appears to me that I am bound by the decision of the Court of Appeal in *In re Mackenzie's Settlement* (8), where it was certainly decided (9) that a contingent interest in property fell within such a covenant.]

The wife's interest in that case was a vested reversionary interest, not, as here, a contingent interest.

[Jessel, M.R.:—I appear to have decided the very point in *Sweetapple* v. *Horlock* (10).]

The present point was not argued in that case: the question there discussed depended upon an entirely different class of cases.

E. T. Holland, for the trustees and executors of Mrs. *Jackson's* will.

(1) 2 D. F. & J. 449.
(2) Law Rep. 13 Eq. 295.
(3) 1 Dr. & Sm. 300.
(4) 32 L. J. (Ch.) 137.
(5) 2 K. & J. 186.
(6) Law Rep. 6 Eq. 210.
(7) 2 Ch. D. 706.
(8) Law Rep. 2 Ch. 345.
(9) Ibid. 348.
(10) 11 Ch. D. 745.

JESSEL, M.R. :—

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The question I have to decide—and though really I have decided it before, I appear to have assumed it rather than decided it—is whether, in a marriage settlement framed like this, a vested reversionary interest in personalty belonging to the wife at the time of her marriage, but subject to be defeated by the exercise of a power of appointment, is comprised in a covenant to settle property of the wife.

My rule of construction is to read words literally unless there is a context controlling them; and reading the material words here I find, first of all, a recital, which does not affect the covenant, because it only refers, as carefully-drawn recitals do, to what is "hereinafter contained": then, after settling certain property of the lady, there is this covenant:—[His Lordship read it down to the exception, and continued:—] Now what is the meaning of the first words, "at the time of the solemnization of the said intended marriage"? Those words are put in to cover property of the wife which had been forgotten or which the parties did not know of. In this country it is by no means uncommon that persons are entitled to property without knowing it. A testator may have died two or three days before the marriage, and his will, giving an interest to the wife, may not have been opened. Therefore the draftsman has put in these words on purpose to catch either what the parties did not remember, or what they did not know of; and that must be borne in mind.

Then there are the words "for any estate or interest whatsoever." If the lady is entitled at the time of the marriage to any real or personal property for any estate or interest whatsoever, it is to be settled. Was she entitled? She was. She was entitled to an absolute vested interest in reversion subject to be divested by the exercise of the power of appointment. Can any lawyer say that she was not entitled to the property for some estate or interest? It has turned out that by the non-exercise of the power of appointment she has got the property, or rather by the deaths of the persons who preceded her.

There is only one other observation to make. The covenant goes on, "Then and in every such case they the said *T. B. Sheriffe* and *M. E. Oliver Massey*, and their respective heirs, executors, or

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administrators, and all other necessary parties, shall and will, at the costs of the said trust estate, as soon as circumstances will permit, and to the satisfaction of the trustees or trustee for the time being of these presents," transfer the property to the trustees in trust for sale. I read those words because they do not, as they do sometimes in the case of similar trusts, negative the notion of a reversionary interest.

It has been sometimes argued that, where you find an immediate trust for sale, the parties cannot have intended to include reversionary interests, because they would fetch very little: but in this case the words certainly do not control the previous context, because it is only "as soon as circumstances will permit," that is, "*reasonably* permit"; and consequently there is nothing there to cut down the effect of the previous words.

Why then should I alter those words? The suggestion is, that, because the interest, although vested, is defeasible, I am to cut down the words and say that they only include an indefeasible vested interest. For my part, I see no reason for such a restriction. If the interest is defeated, *cadit quæstio;* it does not come under the settlement. If it is not defeated, why should it not stand in the same position as if it had been created under the power? I cannot imagine why it should not: and, as I said before, unless there is some reason in the nature of things to the contrary—which I do not find here—I am bound to read it so.

What authority there is on the subject which is binding on me is in favour of that view. There are a great many authorities, not forgetting the very curious case before Lord *Romilly* which was cited, and which is not binding upon me. One of those authorities is certainly binding upon me, because it is the decision of the Court of Appeal, and another I should treat as binding upon me, because it is my own decision. With those two exceptions, I do not find anything binding upon me. The authority which is certainly binding upon me is the case of *In re Mackenzie's Settlement* (1); and when that case is carefully considered it will be seen to be an authority that words like these do include a reversionary interest as distinguished from an interest in possession. The covenant there was, "If the said *Jane Armstrong* now is, or

(1) Law Rep. 2 Ch. 345.

if at any time or times during the said intended coverture she, or the said *Frederic Dickinson* in her right, shall become entitled, by descent, transmission, devise, bequest, gift, representation, purchase or otherwise, to any real or personal property of the value of £400 or upwards, for any estate or interest whatsoever," then they will, "as soon as circumstances will admit"—the words being about the same as we have here—transfer, and so on. The question was, what was the meaning of the words "of the value of £400." The property itself was worth a great deal more than £400, but the value of the reversionary interest at the time of the marriage was alleged to be less than £400. If it were included in the first words, therefore, as property to which she "now is" —that is, at the time of the marriage—"entitled," the question arose whether the £400 referred to the value of her then interest, or whether it referred to the value of the property itself. If it were included in the words "shall become entitled," no question could arise, because the property had fallen into possession during the coverture and exceeded £400 in value. The Lords Justices decided that the "value" meant the value of the property itself. They had previously decided that the covenant comprised it in the first words, that is, as being property to which the wife was entitled at the date of the marriage. That they did so decide is clear. Lord Justice *Turner* says (1) the argument was, "that the covenant did not reach the bank annuities which the Appellant had at the time of her marriage, as they were then in reversion, and their value in reversion was less than the sum of £400." Then he says, "In my opinion, this covenant was intended to reach, and does reach, all property in which the Appellant had at the time of the marriage any estate or interest, if the property itself, as distinguished from the estate or interest which the Appellant had in it, was of the value of £400. The covenant was intended, I think, to sweep in every interest which the Appellant had in property of that value. The terms of the covenant seem to me plainly to import this." Then he reads it and goes on: "Could it be said that if she was entitled contingently, or under an executory devise or bequest, to property of larger value, the covenant would not reach it? and, surely, if property thus circumstanced would

(1) Law Rep. 2 Ch. 348.

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be reached by the covenant, property in which she had a vested reversionary interest would also be reached by it. This construction is, I think, much strengthened by the ulterior part of the covenant, that the property should be conveyed and assigned as soon as circumstances would admit, shewing, as this provision seems to me to do, that the parties had in contemplation property which could not at the time be conveniently dealt with." Therefore that is an express decision that the first words comprised the reversionary interest.

Lord *Cairns*, who was the other Lord Justice, decides the same thing in express terms. He says this (1): "I am of opinion that the whole of her interest in the fund—both her share in her own right, and as next of kin of her brother—was property to which, in the language of the first part of the covenant, she was entitled at the date of the settlement." Then he says he agrees with the other Lord Justice that it means the property itself and not the value of her then reversionary interest.

So that this is an express decision that property to which the lady was entitled in reversion was covered by the words "property to which she now is entitled for any estate or interest whatsoever." It is not an express decision that defeasible reversions are within it; but there is a *dictum* of Lord Justice *Turner's*, not only as to vested, but contingent or executory interests, which shews what his opinion was upon the subject.

The very point did come before me, though it does not appear to have been argued, in *Sweetapple* v. *Horlock* (2). In that case the covenant was in these terms: "In case the said *Elizabeth Horlock* now is, or if at any time during the continuance of her said intended coverture, she the said *Elizabeth Horlock*, or the said *Thomas Sweetapple* in her right, shall, by transmission, devise, bequest, gift, conveyance, donation, representation, inheritance, or otherwise, become beneficially seised of, or interested in, or entitled to, any real or personal property, estate or effects whatsoever, not being the premises hereinbefore settled by her": then they would assure it "with all convenient speed, after such interest . . . shall fall into possession." The words were not "so soon as circumstances will permit," but "after such interest shall

(1) Law Rep. 2 Ch. 349. (2) 11 Ch. D. 745.

fall into possession." Although the point was not argued I certainly gave judgment upon it. There was a preceding power of appointment, and I said this (1): "Miss *Horlock* being thus entitled, in default of appointment by her father, to one-half of the settled property, married Mr. *Sweetapple*, and being of age she and her intended husband entered into the following covenant with the trustees of their settlement." Then I read it. "The words are: 'now is . . . interested in or entitled to any real property.'" I leave out all the other words. "She certainly then was interested in or entitled to a contingent reversionary interest." The word "contingent" I used inaccurately for "defeasible." The passage should therefore run, "She certainly then was interested in or entitled to a defeasible reversionary interest in real property under her father and mother's settlement. Moreover, the covenant is to settle upon trusts which shew at once the parties contemplated reversionary property, because it directs what is to be done with any interest which shall 'fall into possession.'"

So that I clearly considered that the reversionary interest was comprised under the words "now is." As I have already pointed out, Lord Justice *Turner* says that every executory or contingent interest will be comprised, and of course a defeasible interest would be comprised. If an absolute reversionary interest is comprised, how can it be taken out because an event which might defeat it may happen, but does not happen? Of course if the event does happen it may take it out of it, but if it does not, why should the fact of a possibility alter the effect of a covenant which says "any estate or interest whatsoever"? I see no reason whatever why it should; but not wishing to speak disrespectfully of some of the decisions I say nothing further about it.

I therefore hold that Mrs. *Bagot Chester's* one-third is bound by the covenant in her first marriage settlement, except as to £1000, which will be paid to the Petitioners.

Solicitors: *Lake, Beaumont, & Lake; Crowder, Anstie, & Vizard,* agents for *Chapman & Ponting, Warminster; Sladen & Mackenzie; T. Mee.*

(1) 11 Ch. D. 748.

V.-C. M.
1879
Nov. 5.

PAWSON *v.* BROWN.

[1878 P. 307.]

Marriage Settlement—Marriage with Deceased Wife's Sister—Illegal Consideration—Failure of Trusts.

J. P., previously to going through the ceremony of marriage with his deceased wife's sister, executed a settlement reciting the intended marriage, by which certain property was assigned to trustees in trust for the settlor until the solemnization of the marriage, and after the solemnization thereof, and after the decease of *J. P.*, to pay the interest to the intended wife for life, and then for the benefit of his two children by his former wife and such children as he should have by his intended marriage; but if there should be no such child or children, then for *J. P.*, his executors, administrators, and assigns:—

Held, that, as no valid marriage could take place between *J. P.* and his deceased wife's sister, the trust in favour of himself until the solemnization of such marriage continued, and the subsequent trusts never having arisen, the property remained in *J. P.*, and formed part of his general estate.

THIS was a special case, brought for the purpose of having the rights of the parties ascertained.

J. Pawson, before going through the ceremony of marriage with *Sarah Ellerton*, his deceased wife's sister, executed a settlement dated the 1st of January, 1841, by which it was recited that a marriage was intended shortly to be solemnized between *J. Pawson* and *Sarah Ellerton*, and in consideration of the said intended marriage *J. Pawson* assigned a policy upon his life for £2000 to trustees to hold the same upon trust for *J. Pawson*, his executors, administrators, and assigns, until the solemnization of the said then intended marriage, and after the decease of *J. Pawson* to receive the sums of money recoverable on the policy and to invest the same, and to permit *Sarah Ellerton* to receive the income of such investment, during her life or widowhood, and after her decease or second marriage, upon trust to pay, divide, and assign or transfer the funds thereby settled, and all accumulations of the interest thereof during minority, unto, between, and amongst, or to trustees for the Plaintiff *John Ellerton Pawson* and *Margaret Ellerton Pawson* (afterwards the Defendant *Margaret Ellerton*

Brown), the same being the children of *J. Pawson* by his former marriage, and the child or children of the said intended marriage, or any one or more of the said children (including the said *J. E. Pawson* and *Margaret E. Pawson*), in exclusion of the other or others of them, or to their respective issue as the said *J. Pawson* should by deed or will appoint as therein mentioned; but if neither the said *J. E. Pawson* and *Margaret E. Pawson*, nor any child or children of the said intended marriage, should live to attain a vested interest in the said trust moneys, in trust for the said *J. Pawson*, his executors, administrators, and assigns.

Shortly after the execution of this settlement a ceremony of marriage was gone through between *John Pawson* and *Sarah Ellerton*.

John Pawson had, subsequently to the performance of the ceremony of marriage, eight children by *Sarah Ellerton*. *John Pawson* by his will, dated the 17th of July, 1877, devised and bequeathed all his real and personal estate of or to which he should at the time of his death be seised, possessed, or entitled, or over which he should then have a general power of appointment, to the use of the Plaintiffs upon trust as therein mentioned in favour of his son, the Plaintiff *John Ellerton Pawson*, and the testator's five sons by the said *Sarah Ellerton*. And he appointed the Plaintiffs executors of his will. *Sarah Ellerton* died in the testator's lifetime. The testator died on the 30th of August, 1877, without having exercised, or purported to exercise, the power of appointment reserved to him by the settlement (unless he could be considered to have exercised the same by virtue of his will). The sums received under the policy, amounting to £2407 8*s.* 1*d.*, were paid into Court. The Plaintiffs claimed to be entitled thereto as executors of the testator's will, but the Defendants asserted their claim to share therein.

The questions for the opinion of the Court were:—

1. Whether the above-stated indenture of settlement contained a good and valid settlement of the property therein comprised, so far as regarded the interests therein purporting to be thereby given to the Plaintiff *John Ellerton Pawson*, and the Defendant *Margaret Ellerton Brown*, respectively.

2. Whether the same indenture contained a good and valid

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settlement of the same property, so far as regarded the interests therein purporting to be given to the child or children of the marriage therein declared to be then intended, and whether they were entitled to take as being such children of the same marriage.

3. Whether in case there should have been any valid settlement as in either case aforesaid, the power of appointment contained in the said indenture was duly exercised by the will of *John Pawson*.

4. Or whether in default of any such valid settlement or appointment the Plaintiffs, as such executors, were entitled to retain the said sum of £2407 8*s.* 1*d.*, as part of the general estate of the testator, to be applied by them in the due course of administration.

Hood, for the Plaintiffs, the executors of *J. Pawson*:—

This case is entirely governed by *Chapman* v. *Bradley* (1). There the settlement was made upon the marriage of a man with the niece of his deceased wife, and the property was assigned to trustees for himself until the solemnization of the marriage, and then upon trusts for the benefit of himself, his intended wife, and the children of his former wife, and of his intended marriage. The Lords Justices held, upon appeal from the Master of the Rolls (2), that as no legal marriage had ever been solemnized, the first trust in favour of the settlor until the marriage remained in force. In this case likewise, the first trust for the settlor, his executors, administrators, and assigns, until the solemnization of a marriage which could never take place, remained in force, and the fund belonged to the settlor absolutely, and would be distributed as part of his personal estate under the trusts of his will.

Romer, for the Defendant *Sarah Ellerton Brown*, the daughter of *J. Pawson* by his first wife:—

The question here is whether the settlement made by *J. Pawson* is not valid to the extent of those objects who were capable of taking. If the settlement had been made in favour only of the children by the first marriage, it would have been a valid voluntary settlement, and only void against creditors. The bill in *Chapman* v. *Bradley* was filed by the creditors of the settlor, who died insol-

(1) 4 D. J. & S. 71. (2) 33 Beav. 61.

vent. In that case the Master of the Rolls held that the deed was void on the ground of the uncertainty as to the valid and invalid consideration upon which it was based. The Lords Justices no doubt decided upon different grounds, but the case was mixed up with the validity of the marriage which had taken place in a foreign country where such marriages were valid, and the question raised in *Brook* v. *Brook* (1) was discussed at some length. But the case of *Ayerst* v. *Jenkins* (2) is in our favour. There it was held that a Court of Equity would not at the instance of a settlor, or his legal personal representative, adversely set aside a settlement by which the settlor confers on a stranger the absolute beneficial interest in property legally vested in trustees. That settlement was made for an illegal consideration, that is—the cohabitation of the settlor with his deceased wife's sister—both parties well knowing that the marriage about to be solemnized between them would be void. This settlement is perfectly good so far as the objects are capable of taking, and is valid as a voluntary settlement in favour of the legitimate children of the settlor by his first wife, though invalid in respect of the illegitimate children by the then proposed illegal cohabitation: *Howarth* v. *Mills* (3).

Everitt, for children of *Sarah Ellerton*, said he felt there would be no use in arguing the case in their favour.

Locock Webb, Q.C., and *Maclaren*, for others of the same children.

MALINS, V.C.:—

It appears that Mr. *Pawson* married and had by his wife two children. He then formed a second marriage, as he considered, with another lady, who was his deceased wife's sister. The second marriage was absolutely void. That was decided in *Brook* v. *Brook*, although the parties in that case went abroad and were married in a country where such marriages are legal. Therefore it was just the same as if he had lived with the second lady without going through

(1) 3 Sm. & Giff. 481; 9 H. L. C. 193. (2) Law Rep. 16 Eq. 275.
(3) Law Rep. 2 Eq. 389.

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any marriage ceremony. This settlor, having assigned this property to trustees upon trust for himself, his executors, administrators, and assigns, until the solemnization of the said then intended marriage, proceeds to direct that after the solemnization thereof the property shall be held in trust for the benefit of his intended wife and his two children by his first wife, and such children as he should have by the lady with whom he was about to solemnize a second marriage. No doubt he considered, as many other persons have done, that the marriage was a proper, and would be a valid, marriage. However he went through the ceremony, but the event contemplated upon which his own interest was to cease never could and never did take place, and the subsequent trust consequently never arose at all. That would have been my opinion if there had been no authority in support of my view, but the case of *Chapman* v. *Bradley* (1) is directly in point, and had it not been for the case of *Ayerst* v. *Jenkins* (2) I should have had no hesitation whatever. That was a suit to set aside a settlement instituted by the personal representatives of the settlor, whereas this is a special case for the opinion of the Court, and in that case the illegal consideration for the settlement was not apparent upon the settlement. Then the property was vested in trustees for the absolute and unconditional benefit of the lady, without any interest being reserved for the settlement until the marriage, and without any trust in favour of children. The only motive expressed upon the deed was that the settlor was desirous of making a provision for the lady, and the instructions given by the settlor to his solicitor to prepare the deed were that it should be a "deed of gift," although the form of the instrument prepared in pursuance of the instructions was varied. There it was a completed transfer of specific chattels, and the suit was not instituted till ten years after the death of the settlor, and after the lady had been married for some years to another man. The lapse of time was a material ground for upholding the settlement.

Then as to Mr. *Romer's* argument, that although the trusts in favour of the illegitimate children, the offspring of the said connection, cannot take effect, yet that the trusts for the legitimate children by the first marriage may take effect, that would violate

(1) 4 D. J. & S. 71. (2) Law Rep. 16 Eq. 275.

the intention of the settlor, for it is quite certain that he meant to benefit all his children or none. I decide the short point, therefore, that this is a trust which was to arise only upon an event which could never occur, and the consequence is that the property would belong to the settlor absolutely, and his executors will be entitled to it as part of his general estate.

The answer to the 1st, 2nd, and 3rd questions will therefore be in the negative, and to the 4th in the affirmative.

Solicitors: *J. R. Tindale; Jones & Grove.*

V.-C. H.

1879

Aug. 5.

HARRIS *v.* FLEMING.

[1879 H. 322.]

Practice—Service out of the Jurisdiction—Rules of Court, 1875, *Order* XI., *r.* 1.

On the 14th of May, 1877, an agreement was entered into at *Bombay* between the Plaintiff, the Defendant *M. M.*, and the Defendants *N. & Co.* (an Indian firm), to work certain mines in *India* as a joint adventure, in which *N. & Co.* were to find the capital and the Plaintiff to acquire the mining rights, and each partner was to take one-third of the profits.

N. & Co. afterwards went into liquidation in *India*, and their property became vested in trustees residing in *Bombay*. The Plaintiff subsequently ascertained that on the 17th of April, 1879, an agreement had been entered into in *England* between the Defendant *H.*, as the agent of *N. & Co.'s* trustees, and *G.*, the agent of a Scotch company, for the sale of the mining rights to the Scotch company, and that such agreement contained no mention of the Plaintiff's rights.

The Plaintiff then brought an action against *N. & Co.*, their Indian trustees, *H.* (the agent), *M. M.*, and the Scotch company, and by the indorsement on his writ claimed a declaration that under the agreement of the 14th of May, 1877, he was entitled to one-third of the profits of the mining adventure, and that the Defendants and their estates in liquidation might be declared liable to account for and pay all moneys obtained by the Defendants respectively by dealing with the mining properties and fraudulently concealing the Plaintiff's interest therein; with an injunction to restrain the Defendants respectively from carrying the agreement of the 17th of April, 1879, into effect, except on the footing of the Plaintiff being entitled to one-third of the profits, and for ancillary relief.

The Plaintiff, three out of the five members of the firm of *N. & Co.*, and *H.*, were in *England*, but all the other parties to the action were out of the jurisdiction; and the Plaintiff obtained, under Order XI., rule 1, of the Rules of Court, 1875, an order authorizing service out of the jurisdiction of the writ on the Scotch company in *Scotland*.

Upon motion by the Scotch company to discharge this order:—

Held, 1. That the balance of convenience was in favour of the action being tried here.

2. That the case was substantially a partnership case, in which an English Court might properly exercise jurisdiction; and that the Scotch company were not entitled to have their case separated from that of the other Defendants.

3. That the order for service out of the jurisdiction on the Scotch company was rightly made under Order XI., rule 1, because, (*a*) the action "affected," within the meaning of the second branch of the rule, the contract

of April, 1879, which was made within the jurisdiction, and (*b*) because the same contract constituted a breach within the jurisdiction of a contract made abroad.

Order XI. considered.

THE Plaintiff *Edwin Harris*, by his statement of claim, alleged to the following effect:—He was an experienced mining engineer, and having at the end of 1876 examined and acquired special knowledge with reference to the gold mines on the *Seeputtee* estate, in the south of *India*, he, on his return to *Bombay* in the month of February following, became acquainted with the Defendant, Mr. *Matthew Morton*, who carried on business there, and in the course of conversation expressed his desire to find some capitalists who would join him in an adventure for working those gold mines for their mutual profit. The result of this conversation was that the Plaintiff was introduced by Mr. *Morton* to the firm of Messrs. *W. Nicol & Co.*, who carried on business at *Bombay*, and whose firm consisted of the five Defendants—*John Fleming*, *Robert McIlwraith*, *William Nicol* the younger, *Hamilton Maxwell*, and *William Gilmour Hall* (of whom the three first-named Defendants also carried on business in *London* under the style of *Smith, Fleming, & Co.*); and, finally, on the 14th of May, 1877, an agreement was entered into between the Plaintiff, on the one hand, and Mr. *Hamilton Maxwell*, acting for his firm of *W. Nicol & Co.*, on the other hand. By this agreement *W. Nicol & Co.* were to advance the capital for acquiring the estates and mining rights and working the mines; the Plaintiff was to obtain leases of the mining rights and give his services in the joint adventure; and the Plaintiff, Mr. *Morton*, and *W. Nicol & Co.*, were each to be entitled to one-third of the profits. In pursuance of this agreement *W. Nicol & Co.* advanced a sum of money for the purchase of the *Seeputtee* estate, and that estate was, with the approval of *W. Nicol & Co.* and of *Morton*, conveyed to the Plaintiff on behalf of the partnership, and registered in his name on the 24th of July, 1878. At this time the Plaintiff was dangerously ill, and to prevent the complications which might arise from his death, he executed a declaration that he held the *Seeputtee* estate as trustee for *Hamilton Maxwell*, which declaration, however, was not intended to affect the rights either of himself or of *Morton*.

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The firms of *W. Nicol & Co.* and *Smith, Fleming, & Co.* subsequently went into liquidation, the former in *India* and the latter in *England*, and in May, 1879, the Plaintiff first became aware of an agreement dated the 16th and 17th of April, 1879, and made in *London* between the Defendant *R. P. Harding*, as agent for the trustees of the firms of *W. Nicol & Co.* and *Smith, Fleming, & Co.* (who were therein called the vendors), of the one part, and *James Wyllie Guild*, the agent of the Defendants, the *Indian Gold Mines Company* (who were a Scotch registered company), of the other part, whereby Mr. *Harding*, on behalf of the trustees, had agreed that the vendors should assign or cause to be assigned to the *Indian Gold Mines Company* the leases of the *Seeputtee* estate and other mining rights, in consideration that the company should pay to the vendors £10,000 on the completion of the assignments, and should provide certain sums for mining operations, and the expenses of the company, after repayment of which the profits up to £4,000,000 sterling were to be applied as follows:—50 per cent. to the trustees of *W. Nicol & Co.* and *Smith, Fleming & Co.*, and 50 per cent. to the company, and after the £4,000,000 profits had been divided, 50 per cent. of the further profits was to belong to the company, 20 per cent. was to be paid to the trustees, and 30 per cent. to the liquidators of the *City of Glasgow Bank*, but when the liquidators had received £5,000,000 the profits were to be divided equally between the trustees and the company. The Plaintiff then finding his rights under the agreement of the 14th of May, 1877, entirely ignored by the last-mentioned agreement, brought this present action against the five members of the firm of *W. Nicol & Co.*, Messrs. *W. M. Macaulay*, and *T. H. Moore* (the trustees under the Indian liquidation of *W. Nicol & Co.*), Mr. *R. P. Harding*, Mr. *M. Morton*, and the *Indian Gold Mines Company*, and indorsed his writ with a claim for a declaration that under the agreement of the 14th of May, 1877, he was entitled to one-third of the profits of the mining adventure, and that the Defendants and their estates in liquidation might be declared liable to account for and pay all moneys obtained by the Defendants respectively by dealing with the mining properties and fraudulently concealing the Plaintiff's interest therein, and for an injunction to restrain the Defendants respectively from

carrying the agreement of the 17th of April, 1879, into effect except on the footing of the Plaintiff being entitled to one-third of the profits, and for ancillary relief.

Of the various Defendants, Messrs. *Hamilton Maxwell, W. G. Hall, W. M. Macaulay,* and *T. H. Moore,* were resident at *Bombay.* Mr. *M. Morton* was resident in *Scotland,* and the *Indian Gold Mines Company* was a Scotch registered company, carrying on business in *Glasgow.* The Plaintiff and the four remaining Defendants, viz., *John Fleming, Robert McIlwraith, William Nicol* the younger, and *R. P. Harding,* were resident in *England.*

The Plaintiff accordingly applied for and obtained leave, under Order XI., rule 1, of the Rules of Court, 1875, to serve the company with the writ of summons in *Scotland.*

It was stated in the evidence in support of the application that the Plaintiff and several of the Defendants were resident in *England,* and that most of the evidence as to the contract, which was the subject-matter of the action, was in the possession of those of the Defendants who were resident in *London.*

The *Indian Gold Mines Company,* having obtained leave to enter a provisional appearance, now moved to set aside the order giving the Plaintiff liberty to serve them out of the jurisdiction.

W. Pearson, Q.C., and *Everitt,* for the *Indian Gold Mines Company* :—

Under Order XI., rule 1, service out of the jurisdiction is only to be allowed when, 1, the subject-matter of the action is within the jurisdiction; or, 2, the contract to be enforced, rescinded, or affected was entered into within the jurisdiction; or, 3, there has been a breach within the jurisdiction of a contract wherever made; or some act or thing done or situate within the jurisdiction is sought to be restrained or removed. In the present case not one of these requirements is satisfied. The first contract, which is the subject-matter of the suit, was a contract entered into in *India* with reference to land situate in *India,* and this is in fact an action to enforce it. The second contract was between *Macaulay* and *Moore,* who are in *India,* and a Scotch company, with reference to land in *India;* and this contract was quite independent of the first contract, and constituted no breach of it on the part of the

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Scotch company. The case of the company is altogether distinct from that made against the other Defendants, and ought not to be prejudiced by being mixed up with it. The rights of the parties to the original contract must be governed by Indian law, and if, according to that law, the contract was not valid, then there is no foundation for the Plaintiff's case here.

The only case in which the Court ever interferes with reference to land situate out of the jurisdiction is when it acts *in personam: Norris* v. *Chambres* (1). If this is a personal claim, it is only against *Nicol & Co.*, and neither the company, who are the purchasers, nor the trustees of *Nicol & Co.*, who are the vendors (for *Harding* was merely an agent to sign, who is *functus officio*), are within the jurisdiction. The case is therefore not within Order XI., rule 1, and the order allowing service on the company out of the jurisdiction should be discharged.

Hastings, Q.C., and *Millar*, for the Plaintiff:—

The contract of the 16th and 17th of April, 1879, was entered into within the jurisdiction, and the Plaintiff seeks to "affect" it, so that, instead of half the profits being paid to the trustees and half to the company, one-third of those profits should be paid to him. The case is, therefore, within the two first branches of Order XI., rule 1. It is also within the third branch, because the contract entered into within the jurisdiction constituted a clear breach of the original contract entered into in *India*. Again, this is not an action for specific performance of a contract with reference to land in *India*, but an action with reference to a partnership contract entered into in *India* by a Plaintiff resident here, and broken by an act done within the jurisdiction. There is nothing entitling the *Gold Mines Company* to have their case separated from that of the other Defendants: *Dale* v. *Hamilton* (2); and we have practically got all the Defendants here except the company, for *Harding* is the agent of *Macaulay* and *Moore*, who are the trustees of *W. Nicol & Co.*, and he is the person to whom the purchase-money would be payable. The balance of convenience to which, under Order XI., rule 1a, the Judge is to have regard in exercising his discretion whether service out of the jurisdiction

(1) 29 Beav. 246; 3 D. F. & J. 583. (2) 10 Hare, App. vii.

7 Jur. N.S. 59; 689.

shall be allowed, is all in favour of having the action tried here, for the evidence on this point has not been contradicted. Finally, the Plaintiff and Defendants are persons subject to three different jurisdictions, English, Scotch, and Indian, the Indian Defendants being of *Bombay*, where the original contract was entered into, while the mines are in *Madras*, so that, if the argument of the other side were to prevail, the Plaintiff never could have any relief at all, until he found (which is impossible) some Court capable of exercising all these jurisdictions.

W. Pearson, in reply.

HALL, V.C.:—

The question of the balance of convenience may be first dealt with, and it appears to me that the balance of convenience is in favour of having the action tried here. The Plaintiff, who claims to be entitled substantially to one-third of the property or its proceeds, is in this country. The Defendants *John Fleming*, *Robert McIlwraith*, and *William Nicol*, the younger, are here; and the Defendant *Robert Palmer Harding* is here. In that state of things, although there are some persons in *India* who it is said were parties to the original contract (for instance, Mr. *Maxwell*), I should be unwilling to give effect to any contention that it could not be conveniently tried here, and I think it ought to be so tried. It is said that it ought to be tried in *India;* but I do not know what the Plaintiff's rights might be, or what the Courts in *India* would do with reference to this contract with the *Gold Mines Company*, or what order could be made there which would be operative in *Scotland*. The balance of convenience, therefore, is in favour of the action being tried here. Then there is the question whether it ought to go to *India*, by reason of the original contract being one governed by Indian law. I am not at present affected by that consideration. It rather appears to me that this adventure with reference to property in *India* is substantially a case of partnership in which one of the partners is in this country, although there are other persons interested who are in *Madras*, out of the jurisdiction of the Court. The writ in this action so treats it, and I am bound to say that that was the view I took

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when I made the order for service out of the jurisdiction. That being my view of what was the substance of the arrangement between *Harris, Morton,* and *W. Nicol & Co.*, it seems to me a case in which an English Court may properly exercise jurisdiction.

Then it is said that, however that may be, the *Gold Mines Company* stands by itself, and has a right to demand that its case should be looked at singly and separately as if it were the sole Defendant. I am not prepared, however, to take that view. Each case must be governed by its own circumstances. We constantly have actions which cannot go on without a number of parties, some of whom are out of the jurisdiction, but who, although they are out of the jurisdiction, have no right to have their cases isolated from those of the other parties, or to have their rights and interests severed from the rights and interests of the other parties. If their respective rights and interests are in fact mixed up together, then I conceive it is proper to bring them before the Court here.

The next question is whether this is a case in which the Court can make the order under the provisions of the 1st rule of Order XI. as to service out of the jurisdiction, which rule is divisible into four branches. Now the first branch of that rule does not seem to be applicable here, nor is the present case capable of being brought within it. The next branch is this, "whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages of other relief are or is demanded in such action was entered into or made within the jurisdiction." That would not of course apply to the original contract under which the Plaintiff claims, and which was made in *India*. I am not prepared, however, to say that a plaintiff who is unable to bring his own contract within that branch, because it was not made within the jurisdiction, cannot come to the Court and say, "Here is a contract which I seek to have 'affected' by the interposition of the jurisdiction of the Court, because it is one which ought not (having regard to my own contract) to be allowed to be carried into effect; I am not, it is true, entitled to relief upon my own contract, but a contract has been entered into here in violation of my contract, and it is with reference to that second contract that I seek the interposition of the Court." And I am not, I repeat, prepared to say that such

a case would not come within the words of that branch. The whole clause must, as it appears to me, receive a wide construction, so as not to prevent proper and reasonable cases from being brought within it. Therefore, I think, the limited construction attempted to be put upon it is not correct. The contract which is the immediate subject of the complaint in this action was made within the jurisdiction, for it is said that the *Gold Company* purchased the property, by their agent in *London*, and procured a contract from a vendor who signed in *London*, and they claim the benefit of that contract. That, therefore, is a contract entered into within the jurisdiction, and it appears to me quite sufficient (not putting a narrow construction upon the rule) to bring the contract within it.

The rule, however, proceeds further. Its third branch is, "and whenever there has been a breach within the jurisdiction of any contract wherever made." And the Plaintiff's case is, in my opinion, again sustainable on the ground that within the meaning of that branch of the rule there has been a breach within the jurisdiction of a contract made and entered into with him in *India*. There has been that breach of contract by the contract entered into within the jurisdiction to sell this property, ignoring the Plaintiff and disposing of his property altogether without regard to his rights, in effect committing a breach of his rights acquired under his agreement. Therefore, on the whole, it seems to me that the order for service out of the jurisdiction was an order properly made, and I refuse this application with costs.

Solicitors: *J. Donnithorne; Lyne & Holman.*

V.-C. H.
1879
Nov. 8, 10.

In re HARVEY'S ESTATE.
GODFREY *v.* HARBEN.

[1878 H. 279.]

Separate Estate of a Married Woman with Power of Appointment by Will only—Debts of Married Woman—Power exercised in Favour of Volunteers—Property liable for Debts.

15 C.L.D. 89.
7 Ch.D. 459
466
20 Ch.D. 749.
752

Property was settled on a married woman for her separate use for life, with remainder for such persons as she should by her will appoint, with remainder, in default of appointment, for her children or her next of kin, and the married woman made a testamentary appointment in favour of her daughter:—

Held, that the appointed property was liable to the payment of the appointor's debts as if it were her separate estate.

London Chartered Bank of Australia v. *Lemprière* (1) followed.

Vaughan v. *Vanderstegen* (2) not followed.

ADJOURNED SUMMONS.

By two indentures of settlement dated the 18th of October, 1842, made on the marriage of *Eliza Harvey* (deceased) with *S. W. A. Harvey*, certain real and personal estate to which she was entitled, subject to the life interest therein of her mother, was conveyed and assigned to trustees upon trust, subject to the life interest, for conversion and investment as therein mentioned, and it was declared that after the marriage the trustees should stand possessed of the trust property and the income, upon trust, during the joint lives of Mr. and Mrs. *Harvey*, to pay the income of the property to such person as Mrs. *Harvey* should by any writing appoint, and in default of appointment, to her for her sole and separate use, and after the decease of either Mr. or Mrs. *Harvey*, upon trust, if Mrs. *Harvey* should survive her husband, for her, her executors, administrators, and assigns absolutely, but if she should die in the lifetime of her husband, then "for such person or persons, and for such intents and purposes and in such manner" as she should "by her last will and testament, or any codicil" thereto, appoint, and in default of such appointment, for such child or children or other persons who would be her next of kin.

(1) Law Rep. 4 P. C. 572. (2) 2 Drew. 165.

Margaret Henderson (the mother of Mrs. *Harvey*), who died on the 8th of January, 1851, by her will, dated the 7th of June, 1844, gave to trustees all her estate upon trust for sale, and to hold the investments thereof upon trust to pay the income to her daughter (Mrs. *Harvey*) for life for her separate use, and after her decease to transfer the trust funds to such person or persons as she should by her will appoint.

Eliza Harvey, who died on the 27th of October, 1877, and who was by an inquisition held by a Master in Lunacy in June, 1875, found to be a person of unsound mind, by her will, dated the 17th of July, 1871, after reciting the said indentures, and after stating that she had not seen or heard of her husband for many years, and that she did not know whether he was living or dead, and that in the event of his being alive she intended that her will should be taken as made in pursuance of the authority given her by the settlement of 1842, and in the event of his being dead she intended that to be taken as her will made in exercise of her right as a *feme sole*, gave, bequeathed, and appointed all the real and personal property and funds which she was entitled to dispose of under the power in the settlement, or of which she was otherwise possessed, or over which she should have a disposing power, unto her executors and trustees (the Defendants) upon trust for sale, conversion, and investment, and upon trust to pay the income to her daughter for life for her separate use, and, upon her death, upon such trusts as she should by deed or will appoint, and in default of appointment, for her next of kin. By a codicil dated in February, 1873, which she declared she wished to operate whether she was or was not a widow, she directed and appointed that out of the funds over which she might at her death have any power of appointment the sum of £2000 should be paid to trustees upon trusts declared in favour of her granddaughter.

During the time Mrs. *Harvey* lived apart from her husband she contracted liabilities, in respect of which claims were made by the creditors in this suit, except such of them as arose out of the lunacy proceedings. Mrs. *Harvey* died in the lifetime of her husband.

By an order made upon an administration summons on the 24th of July 1878, upon the application of a creditor (the Plaintiff) certain accounts and inquiries were directed, and it was ordered

V.-C. H. 1879

In re HARVEY'S ESTATE. GODFREY *v.* HARBEN.

that Mrs. *Harvey's* separate personal estate should be applied in payment of her debts in a due course of administration.

The account of the trustees of the separate personal estate shewed that such estate was wholly insufficient to pay the debts.

This was a summons by the Plaintiff, asking, as amended by agreement, for a declaration that the property over which Mrs. *Harvey* had a testamentary power of appointment under the settlement of 1842 and her mother's will, was also a part of her separate personal estate.

Cozens-Hardy, for the Plaintiff:—

It may be said that the decisions upon the question whether the property subject to the power given to Mrs. *Harvey* can be applied in payment of her debts, are in some respects conflicting; but it is submitted, considering recent cases, that it can be. In *Sockett* v. *Wray* (1) there was a power given to a married woman to appoint by will only, and it was held that a bond which she had given could not be paid out of the corpus: but in the later case of *Heatley* v. *Thomas* (2), where there was the same limited power, Sir *W. Grant* decided that a bond given by the appointor must be paid out of the appointed assets. Though in *Hughes* v. *Wells* (3), where there was a power to appoint by deed or will, the precise point did not arise, and therefore was not disposed of, yet Vice-Chancellor *Turner* went into the question in great detail, and his *dicta* are important upon it, as shewing what his views were. There was a power to appoint by will only in *Vaughan* v. *Vanderstegen* (4), and it was exercised as in this case, and though Vice-Chancellor *Kindersley* held that the property was not liable to satisfy the appointor's general engagements, yet the question was again discussed (5), and the Vice-Chancellor entertained a different opinion, there having been fraud, and therefore that case is really in favour of my contention. *Hobday* v. *Peters* (6) was a case in which the late Master of the Rolls followed the decision in *Vaughan* v. *Vanderstegen*. In *Johnson* v. *Gallagher* (7) the question

(1) 4 Bro. C. C. 483.
(2) 15 Ves. 596.
(3) 9 Hare, 749, 772.
(4) 2 Drew. 165.
(5) Ibid. 363.
(6) 28 Beav. 354.
(7) 3 D. F. & J. 494.

was, it would seem, treated by Lord Justice *Turner* as not having been settled; and, consequently, in the subsequent case of *Blatchford* v. *Woolley* (1), Vice-Chancellor *Kindersley* followed his own decision in *Vaughan* v. *Vanderstegen* (2); and Lord *Romilly*, in *Shattock* v. *Shattock* (3), where there was a power given to a married woman that could be exercised by deed or will, and she made an appointment by will, held that the property was not liable to pay her debts; but those decisions may be considered as having been overruled in the subsequent case of *London Chartered Bank of Australia* v. *Lempriere* (4), where it was held, under a similar power, similarly exercised, that the estate appointed by a married woman was liable for the payment of her debts; and that case also shews that the distinction taken in *Vaughan* v. *Vanderstegen* as to fraud is not tenable. The *dicta* of Lord Justice *Turner* in *Johnson* v. *Gallagher* (5) was approved and adopted: there is also the case of *Mayd* v. *Field* (6), before the present Master of the Rolls, which supports my contention, and therefore I ask for a declaration that the appointed property is liable to the payment of the appointor's debts.

Charles Browne, for the Defendants, the trustees:—

There have been no less than five decisions—three by Vice-Chancellor *Kindersley* and two by Lord *Romilly*—in similar cases, which, it is submitted, are in favour of the trustees. The result of the cases is, that where a married woman has property settled upon her for her separate use, she is capable of charging and making it liable to her general debts in the same way as if she were a *feme sole*; but if she has only a power, she is not capable of charging or making it liable to her general debts. If she has a power to do something by deed, or any act *inter vivos*, she can bring the property within that power and bind it, and it will become liable to her general engagements, but she cannot do so where she has a testamentary power only, as in that case it never could be brought within the category of her separate estate. The case of *Vaughan* v. *Vanderstegen* clearly explains the exception in regard to fraud.

(1) 2 Dr. & Sm. 204.
(2) 2 Drew. 165.
(3) Law Rep. 2 Eq. 182.
(4) Law Rep. 4 P. C. 572.
(5) 3 D. F. & J. 494.
(6) 3 Ch. D. 587.

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[HALL, V.C.:—I cannot consider that point as being tenable any longer, looking at the decision in the *London Chartered Bank of Australia* v. *Lemprière* (1).]

And there are the cases of *Johnson* v. *Gallagher* (2) and *Norton* v. *Turvill* (3), which seems to be the first case upon the point, which are clearly in favour of the trustees. The decision in *Sockett* v. *Wray* (4) is not distinguishable when the facts are considered. In *Hughes* v. *Wells* (5) the question did not really arise, and therefore that case does not apply, and all that was said in the *London Chartered Bank of Australia* v. *Lemprière* was *obiter dicta* upon the subject. The decision in *Hulme* v. *Tenant* (6) is in our favour. The law as laid down in *Vaughan* v. *Vanderstegen* (7) has been long acted upon, and it will be perilous now to overrule it, and I submit that no case has been made out to enable the Court to hold that this appointed property is liable to the payment of Mrs. *Harvey's* debts, there having been no fraud in incurring them.

HALL, V.C.:—

I am, upon the present occasion, dealing only with the general question which has been argued before me, viz., whether or not as the law now stands a fund or property appointed by a married woman, having a testamentary power of appointment only, is as between the appointees and her creditors, who establish their claims against her separate estate, liable to be resorted to to satisfy these claims. I am not dealing with any particular claim, though it would seem that this is a representative case. Each claim may have some difference in it, and each claimant may or may not be entitled to resort to the property appointed by the testamentary act of this married woman. Mr. *Charles Browne* has cited cases shewing that there is very considerable authority in favour of the view for which he has contended, viz., that property so circumstanced as this is in regard to title—there being no power to appoint by deed, but by will only—is not capable of

(1) Law Rep. 4 P. C. 572.
(2) 3 D. F. & J. 494.
(3) 2 P. Wms. 144.
(4) 4 Bro. C. C. 483.
(5) 9 Hare, 749, 772.
(6) 1 Bro. C. C. 16; S. C. 2 Dick. 560; 1 W. & T. L. Cas. 4th Ed. p. 481.
(7) 2 Drew. 165.

being resorted to for the purpose of satisfying such engagements of a married woman as, according to the law explained in the case of *Johnson* v. *Gallagher* (1), would be payable out of her separate estate only. There is, no doubt, very considerable authority for that contention. Looking at the cases it may be said that the point was an open one at the time when *Johnson* v. *Gallagher* was decided. It was left open by Sir *W. Grant* in the case before him of *Heatley* v. *Thomas* (2), though I observe that the present Master of the Rolls, in his decision in *Mayd* v. *Field* (3), considered that the question had been settled by Sir *W. Grant*.

Then we have the views of Vice-Chancellor *Turner* in the cases of *Johnson* v. *Gallagher* and *Hughes* v. *Wells* (4), and his *dicta* upon the question are very important, as shewn when it was fully discussed in the case of the *London Chartered Bank of Australia* v. *Lempriere* (5). There the grounds of the decisions of Vice-Chancellor *Kindersley* and the *dicta* of Vice-Chancellor *Turner* were commented upon, and we find the full Court of Appeal expressly saying that they concurred in the views of Vice-Chancellor *Turner* and dissented from the views of Vice-Chancellor *Kindersley*, and also that the Court altogether disregarded the distinction taken by Vice-Chancellor *Kindersley* in reference to fraud, for they said "that it was not necessary for the Plaintiff to make out a case of fraud." The element of fraud is not therefore necessary in order to constitute the liability. The Court in that case considered that the married woman was capable of dealing with the property, although by only a testamentary instrument, and that she was in the same position as a man; and as in the case of a man the property, over which he can and does exercise a power of appointment, will become liable to his debts, so a married woman having such a power must be treated as if she were a man—that is, as a person not under disability; and then it follows that property given by her under a power becomes subject to the payment of her debts in preference to the interest in it of the appointees. It may be said, perhaps, that it was a strong and arbitrary thing to so decide, even in the case of a man, as the property was not,

(1) 3 D. F. & J. 494. (3) 3 Ch. D. 587.
(2) 15 Ves. 596. (4) 9 Hare, 749, 772.
(5) Law Rep. 4 P. C. 572.

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in the first instance, his own, and he could only appoint it, but the Courts held, with a strong arm, that inasmuch as he might make it liable to the payment of his debts he should be deemed to have done so, *i.e.*, to be just before being generous. That commends itself to my mind, and I consider that the three learned Judges who concurred in the judgment delivered by Lord Justice *James* in the *London Chartered Bank of Australia* v. *Lempriere* (1) must be taken to have dissented not only from the views of Vice-Chancellor *Kindersley*, but also from the views of Lord *Romilly* in the cases which those learned Judges decided, and which have been referred to. Now, as I consider that their Lordships expressed that dissent very clearly, it appears to me that this is not a case in which I should follow the decisions which have been so dissented from, but a case where I have a guide to decide that under the circumstances the property appointed by this married woman became assets for the payment of her debts, as if it were her separate estate. I am not now dealing with the claims of the creditors; they must be settled in Chambers. Declare that the property appointed by the will of Mrs. *Harvey* in exercise of the powers given to her is applicable to the payment of her creditors as if it were her separate estate.

Solicitors: *G. J. & P. Vanderpump; Hanhart & Gillman.*

(1) Law Rep. 4 P. C. 572.

TAYLOR *v.* GRANGE.

FRY, J.

1879

Nov. 5, 17.

[1878 T. 50.]

Partition—Equitable Estates—Overriding Trust.

Under a will two persons were equally entitled to real property for life, with remainder to their children and issue, who were not yet ascertained. The trustees of the will had, during the lives of the tenants for life, powers of working a quarry on the estate, and making roads, &c., over the property for the purpose, and were directed to work the quarry and divide the profits among the persons entitled:—

Held, that, while the overriding power and trust existed, the Court had no jurisdiction to make a decree for partition or sale under the Partition Acts.

14 Ch D 327 S
26 Ch D 260 S
21 Ch D 676
affirmed by C.A. 16 Ch D 165

JOHN TURNER, by his will, dated the 3rd day of November, 1853, describing himself as a stone proprietor, appointed *Thomas Crabtree*, *John Atherton*, and *Sarah Turner*, to be the trustees and the executors of his said will; and he gave, devised, and bequeathed all his real estate unto them upon trust to permit his wife to occupy the dwelling-house in which he resided, and as to the residue of his estate upon trust that his trustees should receive the yearly and other rents, issues, and profits thereof, and pay the same to his three children, *Elizabeth Taylor*, *Mary Ann Turner* (since deceased), and *Sarah Jane Grange*, in equal shares during their natural lives; and in case any of his said children should die in the lifetime of the other or others of them leaving lawful issue, then the shares of such children so dying were to be paid to the lawful issue of such children, so dying, in equal shares, if more than one, *per stirpes*, and if but one, then the whole to such only child during the remainder of the natural life of the survivors or survivor of them his said three children. And in default of such issue of any of his said children so dying in the lifetime of the other or others of them, then the share or shares of such child or children so dying without issue as aforesaid, as well as the original share or shares of the survivors or survivor of his said children, were to be paid to such survivors or survivor for and during the remainder of her or their life or lives, and from and after the decease of the survivor of them his said three children upon further trust that they his said trustees or trustee for the time being of that his will should stand seised and possessed of his trust estate, effects, and property, or so

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much and such part thereof as might then remain, upon trust as to one equal undivided third part or share thereof for the child, if only one, or for both or all the children, if more than one, of his (the testator's) daughter *Elizabeth Taylor* who either before or after her decease should attain the age of twenty-one years or marry, and his, her, or their heirs, executors, administrators, and assigns (according to the nature of the property); and in default of such issue, or in default of such issue attaining a vested interest in the said undivided third part or share of and in the said trust estate, effects, and property, then in trust for the lawful issue of each of his said other daughters the said *Mary Ann Turner* and the Defendant *Sarah Jane Grange* who either before or after the decease of their respective mothers should attain the age of twenty-one years or be married, if more than one, in equal shares as tenants in common, and if but one, then for such only child. And as to the other undivided parts or shares of his trust estate, effects, and property, upon similar trusts for the children of the testator's daughters *Mary Ann Turner* and *Sarah Jane Grange;* and he declared that the yearly rents, issues, and profits, and annual or other income which by virtue of the provisions of that his will should be payable unto or receivable by each of his said daughters, should be for their respective sole and separate use and benefit without power of anticipation.

And the said testator by his will directed his trustees and trustee for the time being of that his will to get, work, and dispose of all or such part of the stone situate, lying, and being within or under his freehold estate called *Law Head*, as they or he could get, work, and dispose of during the continuance of the trusts of that his will, and for that purpose gave powers to his said trustees to make such roads in, to, and upon his estate as they might think proper or find necessary, and to deposit all earth and refuse to be removed in the course of getting and working such stone, in the most convenient place on the said estate; and he directed his said trustees to keep separate accounts and to apply the clear profits to and for the benefit and advantage of his said children and the issue of any dying in the lifetime of the others or other of them, in such and the same manner, and in such and the same shares and proportions as were thereinbefore by him directed with regard to the yearly and other rents, issues, profits and proceeds

of his said estate, effects, and property; and he authorized his trustees to grant leases of any parts of the estate and to spend money upon rebuilding houses thereon, and to obtain a lease of certain neighbouring stone quarries and to work and dispose of the stone therein, and to finish any buildings which the testator had commenced to build.

The testator died on the 10th of November, 1853, leaving his three daughters, who were his only children, him surviving, and his will was on the 7th day of December, 1853, duly proved by the said *Thomas Crabtree*, *John Atherton*, and *Sarah Turner*.

One daughter, *M. A. Turner*, died in 1863 a spinster and intestate. The trustees were both dead, and the devisee of trust estates of the surviving trustee was made a Defendant to the action.

In January, 1870, a suit was instituted for the administration of the estate of the testator, and the usual inquiries were directed therein by a decree made on the 17th of January, 1872.

This action was brought by Mrs. *Taylor*, one of the surviving daughters of *John Turner*, and her husband and children, against Mrs. *Grange*, the other surviving daughter, her husband and children, for a partition of the real and leasehold estate comprised in the will of *John Turner*.

Mr. and Mrs. *Grange* resisted the action, and among other defences submitted that the trusts of the testator's will as to the quarries on the *Law Head* estate ought to be carried into effect by the Court in the administration suit, and that the quarries ought not to be partitioned during the life of the said Defendant *Sarah Jane Grange*, but worked as a whole, and ought not to be sold, for the sale would be an injury to the Defendant *Sarah Jane Grange*, as entitled for her life to a moiety of the income arising therefrom.

They also submitted that the Plaintiffs, having only equitable estates, could not insist on a partition and a conveyance of the legal estate, and that as both the daughters might have other children there could be no mutual conveyances.

Cookson, Q.C., and *Whitehorne*, for the Plaintiffs:—

One equitable part owner has a right to a partition if his title

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is clear, wholly irrespective of the devolution of the other shares. The powers of management and working which the testator gave to the trustees ought not to stand in the way of this partition.

Lister v. *Lister* (1) was a case where liberty of ingress was reserved to one allottee over the land of another allottee; and compensation was to be allowed for damage. The same principle could be applied here.

Besides, there is nothing to prevent the trustees from continuing to work the quarries, because until the families are ascertained there can be no actual conveyances, and the allottees will hold equitable estates, the trustees still carrying on the active trusts of the will.

[FRY, J.:—There is no jurisdiction, so far as I know, to make a partition of a business; and if a person has a right to a share of net rents or business profits which trustees have to receive, is such person entitled to have a partition of the land from which the rents arise or on which the business is carried on?]

The Plaintiffs, who represent all who are interested in reversion, call upon the trustee, who represents the present interests, to join in a partition.

Fischer, Q.C., and *Colt*, for the Defendants:—

The children, though entitled in reversion to the legal estate, cannot maintain an action for immediate partition: *Evans* v. *Bagshaw* (2). Nor has Mrs. *Taylor* such an estate as to entitle her to a decree. The trustees have a *quasi* estate *pur autre vie* for purposes of management.

North, Q.C., and *H. Humphreys*, for the trustee.

FRY, J., reserved judgment, that precedents might be searched for.

Nov. 17. FRY, J., after reading the will and stating the object of the action, continued:—

It is clear that the Plaintiffs in this case would have had no

(1) 3 Y. & C. Ex. 540. (2) Law Rep. 8 Eq. 469; Ibid. 5 Ch. 340.

right to a partition of the estate under the old Common Law jurisdiction, for they represent no legal interest in the land: there are trusts, including trusts of an active description overriding the equitable estates of the Plaintiffs and Defendants, and they have no present legal estate by virtue of the *Statute of Uses*.

Then have they any better right in equity? At the hearing no authority could be produced for such an action as this, and I reserved judgment that some authority might, if possible, be found. But, after a search, I have not been able to find or hear of any authority for such jurisdiction as I am asked to exercise.

Then is there any principle on which I ought to exercise such jurisdiction? I must answer this question in the negative. For if I were to decree partition I should be putting an end to the active trusts which the testator has directed to be carried on during the lives of his daughters. The effect would be to stop the business of working the quarries and to divide the property in a manner inconsistent with the exercise of the powers given to the trustees.

No doubt an equitable owner may obtain a decree for partition if he be entitled to call for a legal estate, which would have entitled him to a partition at Common Law. But that is not this case, and I should be doing wrong here to make a decree for partition, the result of which, as no conveyances could be at present executed, would be to cause the trusts of the will to be administered separately as to the different persons entitled.

The application was, in my opinion, ill founded, and must be dismissed with costs.

Solicitors: *Torr & Co; Nash & Field; Johnson & Weatherall.*

FRY, J.

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Nov. 25.

FANE *v.* FANE.

[1878 F. 9.]

Action to execute Trusts of Settlement—Costs—Unnecessary Application to Court.

One of two tenants for life under a settlement brought an action, claiming to have the trusts executed by the Court. The statement of claim alleged that the surviving trustee had committed a breach of trust, and asked to have new trustees appointed in the place of him and a deceased trustee. The settlement contained a power to appoint new trustees, exerciseable by the tenants for life. The Plaintiff's income had always been regularly paid to him. At the trial the charges against the trustee were abandoned, and it was admitted that there was no ground for his removal:—

Held, that the Plaintiff was entitled to judgment for the execution of the trusts, but that, the action being unnecessary, he must pay the costs of it up to and including the trial.

BY an indenture dated the 31st of December, 1872, two sums of money, respectively represented by Russian Bonds for £3700, and Russian Bonds for £500, were assigned to *F. A. Fane* and *F. M. Martyn*, upon trust, as to the £3700, to pay the income thereof to *H. J. Fane* during his life, and after his death, if *H. Fane* should be then living, to pay the income to him during his life. And, as to the £500, upon trust to pay the income to *H. Fane* during his life, and after his death, if *H. J. Fane* should be then living, to pay the income to him during his life. And after the death of the survivor of *H. Fane* and *H. J. Fane* the trustees were to hold both sums upon such and the like trusts as were declared by the will of Sir *H. Fane*, deceased, in respect of a family estate called the *Fulbeck* estate. And it was declared that the power of appointing a new trustee or new trustees of the settlement in the place of any trustee or trustees who should die or be abroad, or desire to be discharged, or refuse or become unfit or incapable to act, should be exerciseable by *H. Fane* and *H. J. Fane* during their joint lives. *F. M. Martyn* died in 1876.

The action was brought by *H. Fane* as Plaintiff against *H. J. Fane* and *F. A. Fane* as Defendants. By his statement of claim the Plaintiff alleged that the Defendant *F. A. Fane* was perma-

nently residing abroad; that new trustees of the settlement ought to be appointed in the place of *Martyn* and *F. A. Fane*, and that he had requested the Defendants to concur with him in appointing new trustees, but they had neglected so to do. The Plaintiff also alleged that the Defendant *F. A. Fane* had deposited the Russian Bonds with his bankers, and that the bankers claimed a lien on them for moneys alleged to have been advanced by them to the Defendants, or to one of them with the privity of the other, and that the Defendants threatened and intended, unless restrained, to pledge or deal with the bonds in a manner contrary to the trusts of the settlement.

The Plaintiff claimed to have the trusts of the settlement performed and carried into execution by the Court; to have new trustees appointed in the place of *Martyn* and the Defendant *F. A. Fane;* an order that the Defendants should procure the bonds to be deposited at a specified bank in the names of the persons to be appointed trustees; an injunction to restrain the Defendants from pledging or otherwise dealing with the bonds; and further relief.

The Defendant *F. A. Fane* denied that he was residing permanently abroad, and said that he was only residing there temporarily. Both the Defendants admitted that a new trustee ought to be appointed in place of *Martyn*. The Defendant *H. J. Fane* said that he was desirous that the Defendant *F. A. Fane* should continue a trustee, and *F. A. Fane* said that he declined to retire so long as *H. J. Fane* wished him to remain. *H. J. Fane* said that he was and always had been willing to concur with the Plaintiff in appointing a new trustee in place of *Martyn*, but the Plaintiff had refused to concur in exercising the joint power. Both the Defendants denied that any bank or any person whatever claimed any lien on the bonds for moneys advanced to the Defendants or either of them, and said that no money had ever been advanced to them or either of them by any person on the security of the bonds. And they denied that they threatened or intended to pledge or deal with the bonds in any manner contrary to the trusts of the settlement.

At the trial the Plaintiff withdrew the charges as to the banker's lien upon, and the intention to deal improperly with, the

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bonds, and admitted that there was no ground for the removal of the Defendant *F. A. Fane* from being a trustee. The Defendants admitted that the Plaintiff was entitled to judgment for the execution of the trusts of the settlement, and they expressed their willingness that the bonds should be brought into Court. The only question was as to the costs of the action.

Karslake, Q.C., and *W. W. Karslake*, for the Plaintiff.

North, Q.C., and *J. R. Brooke*, for the Defendant *H. J. Fane*:—

It is not a matter of course that the Plaintiff should have his costs out of the trust fund. He has admitted that there is no ground for giving the relief for which the action was really brought, and he now comes to the Court to ask for a wholly unnecessary declaration. He ought to pay the costs: *In re Brackenbury's Trusts* (1); *Norman* v. *Johnson* (2); *Burrell* v. *Delevante* (3); *Seton's* Decrees (4).

Cookson, Q.C., and *Dundas Gardiner*, for the Defendant *F. A. Fane*.

Karslake, Q.C., in reply:—

The Plaintiff has an immediate interest in the trust fund, and is entitled to have the trusts executed by the Court, and that implies a right to have the costs of the action out of the trust fund. The cases cited against me are distinguishable.

FRY, J., after stating the nature of the relief claimed by the action, continued:—

It is conceded that the Plaintiff is entitled to a judgment for the execution of the trusts, and I pronounce judgment accordingly. It is further conceded as a matter, not of right, but of agreement, that the bonds shall be brought into Court. The real question in controversy is whether the Plaintiff is to have his costs out of the trust fund, or whether he must pay the costs of the action. [His Lordship stated the provisions of the settlement.] The statement of claim alleged that the Defendant *F. A.*

(1) Law Rep. 10 Eq. 45.
(2) 29 Beav. 77.
(3) 30 Beav. 550.
(4) 4th Ed. vol. ii. p. 964.

Fane was permanently resident out of the jurisdiction, and that new trustees ought to be appointed in the place of him and the deceased trustee *Martyn*. It is now conceded that there is no reason for the removal of the Defendant *F. A. Fane*. The statement of claim, moreover, contained other very serious allegations against him, amounting in substance to a gross breach of trust. All these serious allegations have been struck out by the Plaintiff at the Bar, and he has abandoned all the relief which he claimed as founded on them. The claim which must have caused the greatest anxiety to the Defendant *F. A. Fane* has been abandoned, and it is a matter of course that all the costs occasioned by those allegations should be paid by the Plaintiff. The only question is whether the Plaintiff must pay the other costs of the action. It appears to me that the action was really brought only for the purpose of removing the Defendant *F. A. Fane*. The Plaintiff has always regularly received his income; the bonds have never been in any peril; and there has been no breach of trust. There was, therefore, no real ground for the Plaintiff's coming to the Court. At the same time he is entitled to judgment for the execution of the trusts. But, the costs being in my discretion, I think I shall rightly exercise that discretion by ordering the Plaintiff to pay the costs of the action up to and including the trial. In coming to this conclusion, I am fortified by the authority of *Norman* v. *Johnson* (1), and *Burrell* v. *Delevante* (2), the principle of which, I think, applies to the present case.

Solicitor for Plaintiff: *F. W. Dolman.*

Solicitors for Defendant *H. J. Fane: Pawle, Fearon, & Coldham.*

Solicitors for Defendant *F. A. Fane: Swann & Co.*, agents for *Newton & Wallis, Newark-on-Trent.*

(1) 29 Beav. 77. (2) 30 Beav. 550.

FRY, J.

1879

Nov. 24; *Dec.* 3.

HALLETT *v.* HALLETT.

[1879 H. 264.]

Trustee—Breach of Trust—Retainer—Defaulting Cestui que Trust—Set-off.

A policy of assurance on the life of *H.* was taken in the names of trustees and a settlement was executed by virtue of which the bonuses payable on the policy were to be held upon trust for *H.*, and the money assured, on the trusts of the settlement.

H. obtained possession of and misappropriated a portion of the trust funds:—

Held, that the trustees were not entitled as against *H.'s* executrix to impound or retain the bonuses to make good the trust funds misappropriated by *H.*, not as being settled property, because their was a prior resulting trust of them for *H.*: not by way of set-off, because they were not payable till after *H.'s* death.

ON the 10th of June, 1847, *Henry Hughes Hallett* effected a policy of assurance upon his life with the *Legal and General Life Assurance Society* for the sum of £1000 in the names of the Defendants, who were the trustees of his marriage settlement, which was executed on the 14th of June, 1847.

The Plaintiff was widow and executrix of *Henry Hughes Hallett*, and sought to recover certain bonuses on the said policy from the Defendants, who claimed a right to retain them under the following circumstances.

By the above-mentioned settlement it was declared that the Defendants should stand possessed of the said policy and of the sum of £1000 thereby assured, and of a sum of £2300 Consolidated Annuities, which the said *Henry Hughes Hallett* had transferred into the names of the Defendants, upon trust for *Henry Hughes Hallett* for his life, and after the death of either him or his wife, upon trust for the survivor for life, and after the death of the survivor, upon trust for the children. The settlement contained a declaration that nothing therein contained should be construed to vest in the trustees any bonus accumulation or addition which might from time to time be declared on the policy of assurance, but that the same and every part thereof should from time to time be paid unto the said *Henry Hughes Hallett*, his executors or

administrators, for his and their own use and benefit, or be applied as he or they might direct.

The power for investment contained in the settlement authorized the trustees, at the request and with the consent and direction of *Henry Hughes Hallett* during his life, to call in the trust funds and reinvest the produce in the names of the trustees in any security of any nature.

The sum of £2300 Consols was in 1850 sold and the proceeds handed to *Henry Hughes Hallett* for investment, and he in 1870 invested the said trust fund in the purchase of Russian Bonds, part of which he subsequently sold for the sum of £770 10*s.* 8*d.*, which sum was paid to his account with his bankers.

Henry Hughes Hallett died on the 2nd of February, 1878, having by his will appointed his wife sole executrix.

On the 13th of May, 1878, the trustees received on account of the said policy not only the sum of £1000 thereby assured, but a further sum of £452 in respect of bonuses, accumulations, or additions due at the death of the said *Henry Hughes Hallett.*

The estate of *H. H. Hallett* was hopelessly insolvent and was being administered in Court, and the trustees carried in a claim in the administration action for the said sum of £770 10*s.* 8*d.* There were also conflicting claims to the remainder of the said Russian Bonds, which were still pending, and would, if decided against the trustees, increase their claim against the estate. The trustees contended that, inasmuch as the Plaintiff, as executrix of *Henry Hughes Hallett,* claimed the said sum of £452 under the provisions contained in the settlement, they had a right to retain the said sum to make good any loss to the trust funds occasioned by reason of the dealings of *Henry Hughes Hallett* with the trust funds for his own benefit.

Cookson, Q.C., and *B. Fossett Lock,* for the Plaintiff:—

The Defendants claim to retain or impound the bonuses to make good the loss occasioned by *Hallett's* breach of trust: but that principle can only be applied to an interest in the trust fund. The bonuses never were part of the trust fund, nor subject to the trusts of the settlement: they were only mentioned in the deed of settlement for the purpose of being excepted out of it, and

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reserved to *Hallett*. The mere fact that the legal ownership and right to receive the bonuses was vested in the same trustees is not enough: *British Mutual Investment Society* v. *Smart* (1).

J. Pearson, Q.C., and *Dundas Gardiner*, for the Defendants:—

The bonuses were included in the settlement. It makes no difference that the trusts declared of them are different from the other trusts. The right to receive them was in the Defendants, who are therefore trustees of the bonuses, as well as of the sum of £1000 and the other funds, and they can retain the bonuses to replace the moneys which *Hallett* stole from the settlement. The trusts of the bonuses are declared by the settlement, for *Hallett*, his executors and administrators: *In re Best's Settlement Trusts* (2); *Smith* v. *Iliffe* (3).

Cookson, in reply.

Dec. 3. FRY. J.:—

This is an action by Mr. *Hallett's* widow against the trustees of his marriage settlement for moneys had and received under the following circumstances:—[His Lordship then stated the circumstances above stated, and continued:—] The settlement in terms declared the trusts of the policy and the £1000 assured thereby, but reserved the bonuses to *H. H. Hallett* and his executors, and the Plaintiff, Mrs. *Hallett*, now claims the bonuses as his executrix.

The trustees say that *H. H. Hallett* was under a liability to them under the same settlement by virtue of the trusts of which the claim of the Plaintiff as his legal personal representative is made; and there is no doubt that if this claim by Mrs. *Hallett* was really made against the Defendants as trustees of the settlement, then the amount might be properly retained in satisfaction of their claim as trustees against his estate; the question, therefore, comes to this, does she or does she not claim this sum as part of the trust fund included in the settlement? I think she does

(1) Law Rep. 10 Ch. 567, 576. (2) Law Rep. 18 Eq. 686.
(3) Law Rep. 20 Eq. 666.

not, for before the execution of the settlement the Defendants held the policy and its fruits on a resulting trust for *H. H. Hallett*, and everything accruing to him by virtue of the policy would have been his if there had been no settlement. He then settled the policy, but specially provided that nothing in the settlement should vest in the trustees any bonus.

In my view, therefore, the bonuses never were comprised in the settlement, and though the resulting trust was repelled as to the £1000, it was reserved as to the bonuses, and therefore Mrs. *Hallett*, as executrix of her husband, is entitled to the £452 in right of her husband and not through the trusts of the settlement, and the trustees cannot retain that sum as against the money they claim from him. [His Lordship then proceeded to decide that as the Plaintiff's claim was in respect of money which was never payable to her husband personally, but only after his death, while the claim of the trustees was for money due from him in his lifetime, the cases of *Rees* v. *Watts* (1) and *Newell* v. *National Provincial Bank of England* (2) were authorities that such debts were not mutual debts within the *Statute of Set-off*.] Therefore the Plaintiff is entitled to judgment for £452, with interest at 4 per cent. from the day on which the bonuses were received by the trustees, and to the costs of the action.

Solicitors: *H. A. Dowse; Fairfoot & Webb.*

(1) 11 Ex. 410. (2) 1 C. P. D. 496.

C. A.
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In re METCALFE.
HICKS *v.* MAY.

[1876 M. 139.]

Administration—Delay by Creditor—Proof after Certificate of Debts—Negligence—Means of Knowledge.

16 C.L.D. 592
20 C.L.D. 548

M. was the executor of *J.*, who had been the executor of *A.* A decree having been made for the administration of the estates of *A.* and *J.*, a sum of £496 was found due from the estate of *J.* to that of *A.*, and on further consideration directions were given for raising it out of *J.'s* real estate. The account had been taken on the footing that at *A.'s* death nothing was due to him from *J.* for interest. Before anything further had been done, *M.* found a small book in the handwriting of *J.*, by which he admitted himself to owe to *A.* at *A.'s* death £70 for interest on the principal moneys due from him to *A.* This book contained a reference to a page in a larger account book which had been used in making out the accounts; and this page contained an entry to the same effect. The book had no index, and the page in question was at the end of the book, and separated by a number of blank pages from what went before, so that it had never been observed. *M.* petitioned to have the amount to be raised out of *J.'s* estate increased by allowing this interest. *Fry*, J., refused the application on the ground that at the time when the account was taken *M.* had in his hands the account book which contained materials enabling him to make the claim:—

Held, on appeal, that the case fell within the ordinary rule, that a creditor may come in as long as there are assets undistributed, and that the additional amount ought to be raised.

ANTHONY METCALFE died on the 2nd of December, 1868, leaving a will, of which he appointed *John Metcalfe* sole executor. *John Metcalfe* proved the will, and died on the 17th of May, 1870, leaving a will, of which he appointed *Mary May* sole executrix. Mrs. *May* proved the will, and died in September, 1878, leaving a will, of which she appointed her husband, *Christopher May*, sole executor, who proved the same.

The action was commenced in 1876 against Mr. and Mrs. *May* by a person beneficially interested under the wills of *Anthony Metcalfe* and *John Metcalfe* for the administration of both their estates. It came on for further consideration on the 9th of April, 1879, and an order was made for raising, by sale or mortgage of *John Metcalfe's* real estate, the sum of £496 14*s.* 5*d.*, and paying it to the account of the personal estate of *Anthony Metcalfe*.

In the residuary account of *Anthony Metcalfe's* estate, dated the 5th of May, 1871, a sum of £525 14*s.* 6*d.* was entered under the head of "book and other debts." When the accounts in the action were prepared, the persons who had prepared the residuary account were both dead, and the solicitors of the personal representative being imperfectly informed, treated this sum as made up of the principal sum of £500 which was owing from *John Metcalfe* to *Anthony Metc alfe* at the death of the latter, and £25 14*s.* 6*d.* for subsequent interest thereon, and the accounts were taken on this footing. The greater part of this £500 was due from *John* to *Anthony* on a promissory note.

After the order on further consideration had been made, a small account book in the handwriting of *John Metcalfe* was found, in which he admitted that on the 1st of January, 1869, he owed to *Anthony Metcalfe's* estate the £500, with £69 11*s.* 11*d.* for interest thereon. This book contained a reference to a page in a larger account book kept by *John Metcalfe*, which was in the possession of the personal representative, and was used in making up the accounts. The page in question contained entries to the same effect as those in the small book, but was at the end of the book, and was separated by an interval of several blank pages from the other accounts, and the book had no index, so that this page was overlooked until attention was directed to it by the reference in the small book.

The £525 14*s.* 6*d.*, it appeared, was, in fact, made up of the £500 and two sums of £20 and £5 14*s.* 6*d.* due from persons other than *John Metcalfe.*

The £496 14*s.* 5*d.* had not yet been raised under the order of the 9th of April, 1879.

Mr. *May* now presented his petition, alleging that in taking the accounts the estate of *John Metcalfe* ought to be further charged with the £69 11*s.* 11*d.*, and also with £27 9*s.* for interest from the 1st of January, 1869, to the death of *John Metcalfe*, making together £97 0*s.* 11*d.*, and ought to recoup to the estate of *Anthony Metcalfe* £71 6*s.* 5*d.*, being the balance of that sum after deducting the £25 14*s.* 6*d.* The petition prayed that this sum of £71 6*s.* 5*d.* might be raised along with the £496 14*s.* 5*d.*, and dealt with and distributed in the same way.

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The petition was heard by Mr. Justice *Fry*, who, being of opinion that the Petitioner having had in his possession and use the large book which contained the entry as to interest, must be treated as having had knowledge of its contents, dismissed the petition. The Petitioner appealed;

Colt, for the Appellant:—

The Appellant did not know of the entry, and having regard to its position, he cannot be accused of negligence for not knowing of it. Mere delay does not prevent a creditor from coming in while there are assets in hand: *Brown* v. *Lake* (1).

[BAGGALLAY, L.J., referred to *Cattell* v. *Simons* (2).]

That was an exceptional case, turning on wilful default. *Greig* v. *Somerville* (3), *Gillespie* v. *Alexander* (4), and *David* v. *Frowd* (5), are strongly in favour of the claim.

Freeman, contrà:—

This is not the ordinary case of an outside creditor who has let the time slip by; it is that of an accounting party who, with the means of knowledge in his hands, renders an account in one form and then asks to vary it after certificate. There is no case in which even an outside creditor has been allowed to come in and add to his debt after the amount found due to him has been ascertained by the certificate. The Appellant must be fixed with knowledge of the materials contained in the documents in his possession.

JAMES, L.J.:—

On full consideration, I am of opinion that the ground on which Mr. Justice *Fry* proceeded in distinguishing this case from the ordinary case of a creditor coming in after a lapse of time is not sufficient. His Lordship seems to have gone on this, that an entry which shewed that the sum now claimed was due is contained in a book to which the claimant had access, and which he used in

(1) 1 De G. & Sm. 144, 150.
(2) 8 Beav. 243.
(3) 1 Russ. & My. 338.
(4) 3 Russ. 130.
(5) 1 My. & K. 200, 208.

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making up his accounts. Having regard to the position of this entry in the book, and to the fact of the book having no index, there is no ground for saying that the applicant ever knew of the existence of this entry, or was guilty of any negligence in not knowing of it. The interest now in question has never been the subject of decision. We are not reviewing any decision, it is merely a case of carrying in a claim for an amount which the applicant by mistake omitted previously to claim. I think, therefore, that the Petitioner ought to have had liberty to add the amount of interest shewn by the entries to have been due at *Anthony Metcalfe's* death to the amount which has been found due by the certificate to *Anthony Metcalfe's* estate.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitors: *C. T. Hobbs; E. Warriner.*

UNION BANK OF LONDON *v.* MANBY.

C. A. 1879 *Nov.* 4.

[1879 U. 27.]

Practice—Production of Documents before Defence—Rules of Court, 1875, *Order* XXXI., *r.* 12.

In an action for redemption against a mortgagee in possession, an order for production of documents made before the defence was delivered, and without any special case for production being made, was affirmed.

Hancock v. *Guerin* (1) considered.

THE Plaintiffs, by their statement of claim, alleged themselves to be creditors of *James Hall* for sums amounting to £8800, for which judgments were recovered in 1860 and duly registered and re-registered up to the present time, and executions had also been registered on the judgments. *Hall*, as was alleged by the statement of claim, had granted to *C. Manby* mortgages of various leasehold properties in 1858 and 1859. The action was against *Manby* as mortgagee in possession and the assignee in bankruptcy of *James Hall*, who had become bankrupt in 1864, and the

(1) 4 Ex. D. 3.

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Plaintiffs claimed redemption against *Manby* and foreclosure against the assignee.

The statement of claim was delivered on the 2nd of July, 1879. The Plaintiffs, before any statement of defence had been delivered, took out a summons for the common order that the Defendants might make affidavits as to documents in their possession relating to the matters in question in the cause, and might be ordered to produce the documents appearing by such affidavits to be in their possession, except such of them as by the affidavits they might object to produce. The summons was adjourned to the Judge, Vice-Chancellor *Hall*, and his Lordship, on the 11th of July, made in Chambers the order asked for.

Manby, on the 2nd of August, gave notice of appeal, and on the 21st of August delivered a statement of defence.

McSwinney, for the Appellant:—

As a general rule a Plaintiff is not entitled to a discovery of documents until a defence has been delivered: *Hancock* v. *Guerin* (1). The spirit of the new procedure is to avoid unnecessary steps, and till a defence is delivered it cannot be known what the matters in question are. It may be that the defence will admit all the facts alleged by the Plaintiff. The same principle has been applied as to interrogatories in *Mercier* v. *Cotton* (2).

Methold, *contrà*:—

In *Harbord* v. *Monk* (3) it was decided that the rule in *Mercier* v. *Cotton* only applied to actions in the Common Law Divisions. In cases as to production of documents the right must be governed by the old Chancery Rules: *Anderson* v. *Bank of British Columbia* (4). In *Republic of Costa Rica* v. *Strousberg* (5) Lord Justice *Baggallay* evidently inclined to the view that production could be ordered before defence. The production of documents is a matter of right, not of discretion: *Bustros* v. *White* (6).

McSwinney, in reply.

(1) 4 Ex. D. 3.
(2) 1 Q. B. D. 442.
(3) 9 Ch. D. 616.
(4) 2 Ch. D. 644.
(5) 11 Ch. D. 323, 326.
(6) 1 Q. B. D. 423.

JAMES, L.J. :—

I do not think that it is necessary for us to examine minutely the case of *Hancock* v. *Guerin* (1). There is a great deal to be said in support of the proposition that it ought not to be a matter of course for a Plaintiff to rush in at once with an application for production as soon as his statement of claim has been delivered. The Court ought to have the power of saying that it will refuse production, and I do not say that it was wrong to refuse it in *Hancock* v. *Guerin*. But in this particular case it seems to me that the reason for that decision does not apply. In a redemption suit there can be no doubt what the matters in question are. The Plaintiff is alleged to be entitled to the equity of redemption, and the Defendant to be a mortgagee in possession. In a suit of that kind there appears to be no reason why the common order for production should not be made at once. Supposing the Defendant to admit the Plaintiff's whole case, still the Plaintiff may have a right to a production of documents that he may know whether any other parties are interested. The case in the Exchequer Division does not compel a Judge in the Chancery Division to alter the practice which was established in the Court of Chancery.

BAGGALLAY, L.J. :—

I also am of opinion that the decision of the Vice-Chancellor ought to be affirmed. The order he has made clearly comes within the powers given by the Judicature Act and the Rules. As regards *Hancock* v. *Guerin*, which was much relied on, I am not prepared to say whether I should have concurred in the decision, but I certainly cannot accede to the general proposition stated in the head-note to that case.

THESIGER, L.J. :—

I also am of opinion that the order under appeal ought to be affirmed, though I am not prepared to say that a Plaintiff has in all cases an absolute right to obtain a production of documents at

(1) 4 Ex. D. 3.

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once. There is no occasion to decide whether the general rule in *Hancock* v. *Guerin* (1) was rightly laid down, but as at present advised I am not prepared to dissent from that case.

Solicitors for Plaintiff: *Bolton & Co.*
Solicitor for Defendant: *J. Beattie.*

C. A. 1879 M. R. *Nov.* 14. C. A. *Nov.* 15.

DROVER *v.* BEYER.

Practice—Writ of Ne exeat Regno.

The Plaintiff, a mortgagee of a German ship which had been lost, commenced an action in the Chancery Division against the owner on the covenant contained in the mortgage deed, and applied for a writ of *ne exeat regno*, alleging by affidavit that the Defendant was about to leave *England*, and that the debt would be in danger of being lost if he was not prevented from so doing, but not shewing that the Defendant's absence would prejudice the Plaintiff in the prosecution of the action:—

Held, that the writ must be refused, for that the claim was a mere legal demand, for which the Plaintiff could not before the passing of the *Judicature Act* have sued in the Court of Chancery, and that the Defendant could only be prevented from leaving *England* in the case provided for by the *Debtors Act*, 1869, s. 6:

Held, further, by the Master of the Rolls, that the result would have been the same as to an equitable debt before the passing of the *Judicature Act*.

THE Defendant, who was the owner and master of a German ship, executed in *England* a mortgage of the ship to the Plaintiff. The mortgage deed contained the usual covenant for payment, and also contained a declaration that all insurances on the ship should be for better securing the mortgage debt, and subject thereto, for the benefit of the mortgagor. On the 11th of November, 1879, the ship was lost off the English coast, but the master and crew escaped and landed in *England*. The Plaintiff immediately afterwards commenced this action. The indorsement on the writ did not ask for any of the equitable remedies incident to a mortgage, but stated the Plaintiff's claim to be for payment of the debt, under the covenant for payment, and for a writ of *ne exeat regno*. The Plaintiff applied for a *ne exeat*. The affidavit

(1) 4 Ex. D. 3.

in support of the application stated that the ship was lost, that the Plaintiff had no security except the personal liability of the Defendant under his covenant, and that the ship was not insured in *England*, but that the Defendant had stated, and the Plaintiff believed, that she was insured in *Germany*. He further stated that the Defendant was about immediately to return to *Germany*, and that the debt would be in danger of being lost unless he was prevented from going out of the jurisdiction.

Nov 14. *Fellows*, for the motion, contended that the case came clearly within the rule as laid down in *Seton* on Decrees (1), and that the writ of *ne exeat* ought to be granted.

JESSEL, M.R.:—

Under the present practice the writ of *ne exeat regno* is not to be issued except in cases which come within the provisions of sect. 6 of the *Debtors Act*, 1869. After the passing of the Act 1 & 2 Vict. c. 110, a creditor could still, in certain cases, arrest his debtor on mesne process at Common Law. The Court of Chancery exercised an analogous jurisdiction where the debt was not a legal debt, that is, where a creditor could not go to a Common Law Judge to arrest the debtor on mesne process. But this equitable remedy was given simply because, the debt not being a legal debt, there was no remedy at law. The *Debtors Act*, 1869, still further limited the power of arrest on mesne process, and by sect. 6 of that Act a Common Law Judge could not arrest on mesne process unless he was satisfied that the absence of the Defendant from *England* would "materially prejudice the Plaintiff in the prosecution of his action." Following this analogy the Courts of Equity would immediately have said, "As our process of *ne exeat* is only issued because the debt is equitable, of course we must not issue it except in cases in which a Common Law Judge would issue it if there were a legal debt."

But whether that were so or not, when the *Judicature Act* passed, and there was only one jurisdiction, it could never have been supposed that any practice of the Courts of Equity was to supersede the 6th section of the *Debtors Act*, 1869, because that would have

(1) 4th Ed. p. 316.

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restored the arrest on mesne process in every case where it was not abolished by the Act of 1 & 2 Vict. c. 110, which would have been an extraordinary result, such as the Legislature could never have intended when it has provided that the rules of equity are to prevail wherever they conflict with those of law. There is now no substantial distinction between an equitable and a legal debt.

In the present case the Defendant could not be arrested on final judgment, and there is nothing to shew that the absence of the Defendant from *England* will materially prejudice the Plaintiff in the prosecution of his action, and the application must be refused.

Nov. 15. The application was renewed before the Court of Appeal.

Fellows, for the motion :—

I submit that the equitable process of *ne exeat* is not taken away by the *Debtors Act*, 1869, and the Judicature Acts.

[JAMES, L.J. :—Suppose it is not. That does not help you. The claim you make in this action could not have been brought forward in Chancery. Your action is a simple action on a covenant to pay a sum of money.]

I contend then that the Plaintiff will be prejudiced in the prosecution of his action if the Defendant goes abroad. It is important to interrogate the Defendant as to insurances on the ship, which cannot be done if he escapes to *Germany*, and the case is thus brought within the exception in the *Debtors Act*, 1869, s. 6.

[THESIGER, L.J. :—That argument seems to go the length of saying that a foreign debtor who is in *England* may be kept here by *ne exeat* for the purpose of ascertaining what property he has.]

The mortgage deed gives us a charge on the insurances.

JAMES, L.J. :—

The application for a *ne exeat* is wrong. The debt is a mere legal demand, in respect of which the Plaintiff could not have sued in Chancery before the passing of the *Judicature Act*. The Defendant cannot, therefore, be prevented from leaving *England*

unless you can bring the case within the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), s. 6. This you cannot do, as there is no ground for saying that the absence of the Defendant will prejudice the Plaintiff in the prosecution of the action.

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BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitors: *Stibbard, Gibson, & Co.*

Ex parte KILNER. *In re* BARKER.

C. A. 1879 C. J. B. *May* 26. C. A. *Nov.* 20.

Bill of Sale—Act of Bankruptcy—Assignment of whole Property to secure pre-existing Debt—Antecedent Agreement to give Bill of Sale "if or when required" by Creditor—Onus probandi.

When a bill of sale comprising the whole of the grantor's property is given on the eve of his bankruptcy to secure a pre-existing debt, and it is attempted to support it by an agreement alleged to have been made at the time when the money was advanced, it is for the Court to judge from all the surrounding circumstances whether the agreement was a *bonâ fide* one, or whether the giving of the bill of sale was purposely postponed in order to protect the grantor's credit.

The fact that the agreement was to give the bill of sale "if or when required" by the creditor does not of itself necessarily invalidate it.

Ex parte Fisher (1) explained.

The Court will require a very clear explanation of the delay in the execution of the bill of sale, and the *onus* is on the person who sets up the prior agreement to prove, not only its existence, but its *bona fides*.

JOHN THOMAS BARKER was a tailor and draper at *Wigan*. In November, 1877, he was about to commence business, and, having no capital, he requested his mother and his uncle, *James Barker*, who were the executrix and executor of his father's will, to advance him £359, out of moneys belonging to his father's estate. *James Barker* consented to this on the terms of the following agreement, which was dated the 14th of November, 1877, and signed by *J. T. Barker* and his mother:—

"Received from Mr. *James Barker*, trustee and executor of the late Mr. *John Barker*, the sum of £359, and we respectively

(1) Law Rep. 7 Ch. 636.

C. A. 1879 *Ex parte* KILNER. *In re* BARKER.

undertake to execute a mortgage of our respective interests under the will of the said *John Barker* for securing the said sum of £359 and interest thereon from this date, after the rate of 5 per cent. per annum, and, if required by the said *James Barker*, the undersigned *J. T. Barker* shall further secure the said £359 and interest upon the stock-in-trade, fixtures and effects now or for the time being in, upon, or belonging to the shop and premises of the said *J. T. Barker*, No. 7, *Millgate Street, Wigan*, now occupied by him."

James Barker died early in September, 1878. He had made no application for the bill of sale during his lifetime. On the 18th of September, 1878, *J. T. Barker* executed a mortgage to his mother, *Alice Barker*, of his interest under his father's will, to secure the £359 and interest, and on the same day, at her request, he executed in her favour a bill of sale of "all and singular the stock-in-trade, fixtures, furniture and effects which now or hereafter shall be in or about the house and premises No. 7, *Millgate Street, Wigan*," to secure the £359 and interest. The bill of sale comprised substantially the whole of the grantor's property (other than that which was comprised in the mortgage), and it contained a recital that the £359 had been advanced upon an undertaking that the bill of sale should be given to secure its repayment. At the time when it was given *J. T. Barker* was in great pecuniary difficulties, and several writs had been issued against him by creditors. The mother at once took possession of the property, and it was sold on her behalf a few days afterwards.

On the 10th of October, 1878, *J. T. Barker* filed a liquidation petition.

The Judge of the *Huddersfield* County Court held that the bill of sale was an act of bankruptcy, and declared it to be void against the trustee in the liquidation. Mrs. *Barker* appealed to the Chief Judge.

The appeal was heard on the 26th of May, 1879.

De Gex, Q.C., and *E. Cooper Willis*, for the Appellant:—

The County Court Judge seems to have thought it necessary that the agreement to give the bill of sale should have been an absolute promise; and that, as it was conditional only, the bill of

sale must necessarily be void, on the authority of *Ex parte Fisher* (1). But no such rule of law exists: *Mercer* v. *Peterson* (2); *Ex parte King* (3); *Ex parte Jackson* (4); *Ex parte Izard* (5); *Jones* v. *Harber* (6).

Winslow, Q.C., and *Finlay Knight*, for the Respondent:—

The circumstances are sufficient to bring the case within *Ex parte Fisher*.

BACON, C.J.:—

Nothing can be clearer than the principles upon which this case rests. The transaction is a very plain one. *James Barker* was in a position to compel specific performance of the agreement at any time he thought fit. [His Lordship referred to the terms of the agreement, and continued:—]

This promise was not conditional, it was an absolute promise. I do not agree with the learned Judge's view of the evidence. It seems to me that nothing like fraud was intended by either party.

The decision in *Ex parte Fisher* went wholly on the ground of fraud. The Lords Justices were of opinion that the creditor who took the bill of sale in that case contemplated a fraud upon the other creditors, and accordingly they decided as they did.

In this case there is no ground for suspecting any irregularity, even if the mother knew of the insolvent circumstances of the debtor. It was her duty as well as her interest to obtain security for her debt.

The order of the County Court must be discharged with costs.

From this decision the trustee in the liquidation appealed. The appeal was heard on the 20th of November, 1879.

Winslow, Q.C., and *Finlay Knight*, for the Appellant:—

The present case is stronger than *Ex parte Burton* (7). There is no evidence that *James Barker* asked for the bill of sale, and it was not in fact given till after his death. The bill of sale

(1) Law Rep. 7 Ch. 636.
(2) Law Rep. 2 Ex. 304; Ibid. 3 Ex. 104.
(3) 2 Ch. D. 256.
(4) 4 Ch. D. 682.
(5) Law Rep. 9 Ch. 271.
(6) Ibid. 6 Q. B. 77.
(7) 13 Ch. D. 102.

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includes in substance the whole of the debtor's property, and the agreement entered into when the money was advanced was not an absolute one to give a bill of sale, but only an agreement to give it if required by the creditor. The execution of the bill of sale was purposely postponed until the debtor should be in insolvent circumstances, in order to protect his credit. *Mercer* v. *Peterson* (1) and similar cases do not apply, but the case is governed by *Ex parte Fisher* (2).

De Gex, Q.C., and *E. Cooper Willis*, for the bill of sale holder:—

In *Ex parte Burton* (3) the bill of sale was not to be given until the creditor had "lost confidence" in the debtor. Here it was to be given "if required" by the creditor.

[JAMES, L.J.:—Those were the very words used by Lord Justice *Mellish* in giving the judgment of the Court in *Ex parte Fisher* (4).]

Ex parte Fisher depended on its particular facts. It is not a decision that an agreement to give a bill of sale if or when required by the creditor is one which necessarily and in every case cannot support a bill of sale of the whole of the debtor's property. That would be inconsistent not only with *Harris* v. *Rickett* (5), *Mercer* v. *Peterson*, and many other cases, but also with the subsequent decisions of this Court in *Ex parte Izard* (6) and *Ex parte King* (7). The question in each case is whether the antecedent agreement was merely colourable, whether the real intention was to postpone the giving of the bill of sale until the debtor should become insolvent; *Ex parte Jackson* (8). In the present case there is no evidence of any such intention.

BAGGALLAY, L.J.:—

The principle applicable to cases of this description is enunciated by Lord Justice *Mellish*, in giving the judgment of the Court in *Ex parte Fisher* (9), in these terms: "Although we do

(1) Law Rep. 2 Ex. 304; Ibid. 3 Ex. 104.
(2) Law Rep. 7 Ch. 636.
(3) 13 Ch. D. 102.
(4) Law Rep. 7 Ch. 645.
(5) 4 H. & N. 1.
(6) Law Rep. 9 Ch. 271.
(7) 2 Ch. D. 256.
(8) 4 Ch. D. 682.
(9) Law Rep. 7 Ch. 644.

not dispute the rule that where a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale, we do not think this rule will protect transactions where the giving of the bill of sale is purposely postponed until the trader is in a state of insolvency, in order to prevent the destruction of his credit, which would result from registering a bill of sale. We think that such a postponement is evidence of an intention to commit an actual fraud against the general creditors." He dealt with the particular circumstances of that case, and said (1) that there was evidence "from which we infer that it was understood between the bankrupt and Mr. *Wells* from the commencement of the advances that a bill of sale was to be given, if required by Mr. *Wells*, though, for the purpose of protecting Mr. *Ash's* credit in the meantime, the giving of the bill of sale was purposely postponed until he was unable to go on, and was in a state of insolvency." Now I think it is clear from the way in which the principle is enunciated by Lord Justice *Mellish*, that it must be for the Court in each case that comes before it to take into consideration all the surrounding circumstances, and to see whether, having regard to those circumstances, there is evidence of an intention to commit an actual fraud against the general body of creditors. Reference has been made by Mr. *De Gex* to *Ex parte Izard* (2) and *Ex parte King* (3), in each of which the transaction in question was held not to have been a fraud against the general body of creditors. But I think upon an examination of those cases it will be found that they were decided upon their special circumstances. In neither of them was any dissent expressed from the principle enunciated in *Ex parte Fisher*. In *Ex parte Izard*, Lord Justice *Mellish*, having gone through the circumstances, came to the conclusion that there was no ground for treating the transaction as fraudulent, though he ended by saying that the circumstances were very suspicious. I apprehend that that very remark pointed to this, that, had they been a little more adverse to the Respondents than they actually were, the decision would have been the other way. In the present case we have got this fact, a promise that, if required

(1) Law Rep. 7 Ch. 643. (2) Law Rep. 9 Ch. 271.
(3) 2 Ch. D. 256.

C. A. 1879 *Ex parte* KILNER. *In re* BARKER.

by *James Barker*, the debtor will further secure the £359 and interest upon the stock-in-trade, &c., at the place where he was then carrying on business. There is no absolute promise that the assignment is to be made, but only a promise that it is to be made if required. I will assume that *James Barker* made the application for the bill of sale. What were the surrounding circumstances? A man carrying on business gets into difficulties and borrows a sum of money, agreeing to give a bill of sale over his property, but not until such time as, for his own protection, the person having the power to require it should think it necessary to do so. It was postponed for the protection of the trader. If it had been given at an earlier period the debtor's credit would have been ruined by the registration of the bill of sale. We find also this, that *James Barker*, the person who had the power to require the execution of the bill of sale, died without having made any demand for it. I am not suggesting that the right to demand it did not survive to his co-executor and co-trustee who did make the demand, as long as she understood that the object of the transaction was that the assignment was not to be called for until such time as it might be deemed necessary for her own protection. But, a few days after *James Barker's* death, writs then being out against the debtor, the demand is made. I think the case is entirely covered by *Ex parte Fisher* (1).

THESIGER, L.J.:—

The Respondent claims under a bill of sale which comprised the whole of the debtor's property, and which was given at a time when no advance of any sort or kind was made as the apparent consideration for it. She relies upon a prior agreement which she says supports the bill of sale on the principle laid down in *Mercer* v. *Peterson* (2) and cases of that class. Those principles are undoubtedly binding upon this Court, but I cannot shut my eyes to the fact that their application in any particular case ought to be most carefully guarded, because it cannot be disputed that they do, unless they are applied with very great caution and under the most careful limitations, open the door to very considerable frauds. It appears to me, therefore, right that the Court should require from

(1) Law Rep. 7 Ch. 636. (2) Law Rep. 2 Ex. 304; Ibid. 3 Ex. 104.

any person setting up a bill of sale, executed under such circumstances as those which exist in the present case, very clear evidence that the agreement which is set up for the purpose of rendering the bill of sale valid was a *bonâ fide* agreement, or, in other words, using the expression of Lord Justice *Mellish* in *Ex parte Fisher* (1), that it was not an agreement that the bill of sale was to be delayed until such time as the trader should be in a state of insolvency, in order to prevent the destruction of his credit which would result from the registration. I think that the decision in *Ex parte Fisher* supplied a most wholesome corrective to the dangers which, as it seems to me, may arise from the principles laid down in *Mercer* v. *Peterson* (2), and that we ought to apply the doctrines laid down by Lord Justice *Mellish* to their full extent, and to require, in this and similar cases, a very clear explanation of the reason why the giving of the bill of sale was delayed. Here no explanation whatever is given of the delay, and I should infer from the evidence that the intention of the parties at the time when the agreement of November, 1877, was made was, that no bill of sale should be required until the debtor should be in a state of insolvency, in other words, the execution of the bill of sale was postponed for the purpose of protecting his credit. It seems to me that that inference may be derived from the words of the receipt or agreement itself, as well as from the surrounding circumstances. And even though the agreement standing by itself, or the fact that the bill of sale was only called for when the debtor was in a state of insolvency standing by itself, would not necessarily lead to that inference, yet, putting the two together, and coupling them with the fact that no explanation is given why the execution of the bill of sale was delayed, I come to the conclusion that it was delayed for the very reason which it was held in *Ex parte Fisher* (3) would invalidate a bill of sale.

13 C.L.D. 642

JAMES, L.J.:—

The judgment just delivered by Lord Justice *Thesiger* confirms me in my opinion that our decision in *Ex parte Fisher* was right, and that it ought to be applied without any hesitation.

(1) Law Rep. 7 Ch. 644. (2) Law Rep. 2 Ex. 304; Ibid. 3 Ex. 104.
(3) Law Rep. 7 Ch. 636.

C. A. 1879 *Ex parte* KILNER. *In re* BARKER.

I understood Lord Justice *Thesiger* to say—I wish to say it if he did not, and I wish to repeat it if he did—that where a document is set up which upon the face of it is an act of bankruptcy, that is, an assignment of all a man's goods for a past consideration, if it is said that it is not an act of bankruptcy because it is warranted by a prior agreement, the *onus probandi* is always upon the person who sets up the prior agreement to prove, not only that the agreement did exist in fact, but that it was in all respects a *bonâ fide* agreement.

23 Ch D 639 642

Solicitors for Appellant: *Layton & Jaques*, agents for *Ainley & Hall, Huddersfield.*

Solicitors for Respondent: *Learoyd, Learoyd, & Peace*, agents for *W. S. France, Wigan.*

C. A. 1879 Nov. 20.

Ex parte EVANS. *In re* WATKINS.

Bankruptcy — Secured Creditor — Judgment Creditor — Elegit — Receiver — Equitable Execution—Statute 27 & 28 *Vict. c.* 112, *s.* 1—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 16, *sub-s.* 5—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

14 Ch D 45 16 Ch D 547 556 17 Ch D 655 663 22 Ch D 607

Since the coming into operation of the *Judicature Act*, 1873, it is not necessary for a judgment creditor, who seeks to obtain equitable execution of the judgment debtor's equitable interest in land, previously to sue out an *elegit*.

The appointment of a receiver of the rents of land at the instance of a judgment creditor, though conditional upon the receiver's giving security, operates as an immediate delivery of the land in execution.

When the security is afterwards given the order relates back to the date when it was made.

Edwards v. *Edwards* (1) explained.

A judgment creditor became the transferee of a legal mortgage of leaseholds belonging to the judgment debtor. He then commenced an action in the Chancery Division, claiming an account and payment of what was due to him on both mortgage and judgment; or a sale of the property and payment out of the proceeds; and the appointment of a receiver. On the same day he obtained *ex parte* an order extending over eight days, appointing an interim receiver of the rents, without security. On the eighth day he obtained, on notice, an order absolute for the appointment of the same person to be receiver of the rents, upon his giving security. On the same

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(1) 2 Ch. D. 291.

day the debtor filed a liquidation petition, and a receiver of his property was appointed by the Court of Bankruptcy. It did not appear which receiver was appointed first. The receiver in the action never gave security. The creditor had not sued out an *elegit*:—

Held (affirming the decision of *Bacon*, C.J.), that the appointment of the receiver in the action was such a delivery in execution by lawful authority of the mortgaged lands, within the meaning of sect. 1 of the Act 27 & 28 Vict. c. 112, as to render the judgment creditor a secured creditor, within the meaning of sect. 16, sub-sect. 5, of the *Bankruptcy Act*, 1869, and that he was entitled to hold the lands as a security for his judgment debt as well as for his mortgage debt.

THIS was an appeal from a decision of the Chief Judge (1).

The following is a short summary of the material facts:—

On the 15th of May, 1878, *W. Davies* recovered judgment in an action in the Queen's Bench Division against *Thomas Watkins* for £80 2*s.* 1*d.* and costs.

On the 26th of July, 1878, a legal mortgage of leaseholds to secure £200 and interest, which had been created by *Watkins* in 1859, was transferred to *Davies*.

On the 7th of August, 1878, *Davies* commenced an action against *Watkins* in the Chancery Division. The writ was indorsed with a claim for an account of what was due to the Plaintiff on the mortgage, and on the judgment, and for payment; or for a sale of the mortgaged property and payment out of the proceeds of sale; and for the appointment of a receiver and an injunction. On the same day the Plaintiff applied *ex parte* to the Master of the Rolls for the appointment of an interim receiver. The Plaintiff made an affidavit in which he said (*inter alia*) that the Defendant was not, to his knowledge, "entitled to any other land or hereditaments, or any other property against which any writ of *elegit*, *fieri facias*, or other process of execution, may be issued for the purpose of obtaining payment of" what was due upon the judgment. The Master of the Rolls thereupon appointed *T. W. Jones* interim receiver, to receive the rents and profits of the property comprised in the mortgage, without security, until after the 14th of August, 1878, but the order provided that "such interim receiver is not in the meantime to take possession of the said hereditaments and premises."

On the 10th of August, 1878, the judgment was registered. On

(1) 11 Ch. D. 691.

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the 14th of August an order was made by the Master of the Rolls, upon notice, that *T. W. Jones*, upon his giving security, should be appointed to receive the rents and profits of the mortgaged property; and that the tenants were to attorn and pay their rents to the receiver.

Jones never gave the security.

On the same 14th of August *Watkins* filed a liquidation petition in the *Aberdare* County Court, and a receiver of his property was appointed. It did not appear whether this order or the order of the Master of the Rolls was made first.

No writ of *elegit* was issued by *Davies*.

A trustee was afterwards appointed in the liquidation.

On the 12th of March, 1879, the Judge of the County Court made an order declaring that *Davies* had obtained a charge or lien on the equity of redemption in the leaseholds, in respect of the said judgment and the subsequent proceedings in the Chancery Division, or a right to tack the judgment debt to the mortgage debt. This order was affirmed by the Chief Judge.

Romer, for the Appellant:—

The question is whether before the filing of the liquidation petition *Davies* had obtained a charge or lien on the land.

[BAGGALLAY, L.J.:—Whether he had a right to tack the judgment debt to the mortgage debt?]

As against the trustees in bankruptcy of the mortgagor, the mortgagee could not, if he had sold the mortgaged property, retain out of the purchase money an unsecured debt in addition to the mortgage debt.

Sect. 1 (1) of the Act 27 & 28 Vict. c. 112, is very precise in its terms.

The words "writ of *elegit* or other lawful authority" have been construed to mean legal or equitable execution.

(1) The preamble of the Act recites that "it is desirable to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates in respect of future judgments, statutes and recognizances."

Sect. 1. "No judgment, statute, or recognizance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment, statute, or recognizance."

In *Brace* v. *Duchess of Marlborough* (1), it was held that where the judgment debt came first, and the judgment creditor afterwards got in a first mortgage, there could be no tacking. No debt which is not a charge or lien on the land can be tacked to a mortgage debt: *Fisher* on Mortgages (2). It must be shewn, therefore, that the land was actually delivered in execution to *Davies* before the liquidation petition was filed.

The question therefore is what was the effect of the proceedings in the action in the Chancery Division? The appointment of the receiver by the order of the 14th of August was conditional on his giving security; till the security was given the order had no effect at all, and the security in fact never has been given: *Edwards* v. *Edwards* (3).

[JAMES, L.J.:—The only point decided there was that it was not a contempt of Court for an execution creditor to seize chattels after an order had been made by the Chancery Division appointing a receiver on his giving security, but before the security had been given or possession taken. The case related to chattels, not to land.]

The interim order of the 7th of August surely cannot amount to equitable execution, even if it had not been qualified by the express direction that the receiver was not to take possession of the land.

[JAMES, L.J.:—A receiver of land never takes actual possession; he only receives the rent.]

The order of the 14th of August must have had the effect of discharging the interim order.

[JAMES, L.J.:—The interim order extended over the whole of the 14th of August.]

The two orders could not well co-exist. But the interim order was not made with the view of creating a charge on the land. At any rate the appointment of receiver is referable to the Plaintiff's position as mortgagee. Since the *Judicature Act* it is the practice to appoint a receiver at the instance of a legal mortgagee. The

(1) 2 P. Wms. 491.
(2) 3rd Ed. pp. 615, 616.
(3) 2 Ch. D. 291.

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authorities are clear that a Court of Equity will not appoint a receiver until the judgment creditor has exercised his option by issuing an *elegit*, and thus doing all that he can to enforce his judgment at law: *Neate* v. *Duke of Marlborough* (1); *Champneys* v. *Burland* (2); *Smith* v. *Hurst* (3); *In re Cowbridge Railway Company* (4); *Wallis* v. *Morris* (5); *Hatton* v. *Haywood* (6); *Anglo-Italian Bank* v. *Davies* (7). The order appointing the receiver in the action was therefore one which ought not to have been made, and it is inoperative. The *Judicature Act* has made no difference in the practice in this respect: *Judicature Act*, 1873, s. 25, sub-s. 8; Rules of Court, 1875, Order XLII., r. 1; Order XLIII., rr. 1, 2. Sect. 3 of the Act 27 & 28 Vict. c. 112, requires that the writ shall be registered, and this shews the importance attached to the publication of notice of the execution.

[JAMES, L.J.:—The question is whether equitable execution has been given; not whether the Court ought to have given it.]

The Master of the Rolls could properly have appointed a receiver in respect of the mortgage debt, and the order must be construed in that way.

JAMES, L.J.:—Sect. 13 of the Act 1 & 2 Vict. c. 110, says that the charge created by a judgment shall not operate to give the judgment creditor any preference in case of the bankruptcy of the judgment debtor, unless the judgment shall have been entered up one year at least before the bankruptcy. Those words are very strong, but the limitation applies only to the lien which is created by the Act, and it does not affect any previously existing remedies of the judgment creditor.

Winslow, Q.C., and *Millar*, for the judgment creditor:—

The words of sect. 1 are "delivered in execution by virtue of a writ of *elegit or* other lawful authority." The argument that in every case there must be a writ of *elegit* issued amounts to this, that "or" is to be read "and." Under the Act 1 & 2 Vict. c. 110, the charge could not be enforced for a year; under sect. 4

(1) 3 My. & Cr. 407.
(2) 19 W. R. 148.
(3) 10 Hare, 30, 48.
(4) Law Rep. 5 Eq. 413, 417.
(5) 12 W. R. 997.
(6) Law Rep. 9 Ch. 229.
(7) 9 Ch. D. 275.

of the Act 27 & 28 Vict. c. 112, the judgment creditor to whom the land shall have been actually delivered in execution, and whose writ or other process of execution shall be duly registered, is entitled forthwith to obtain from the Court of Chancery an order for the sale of the debtor's interest in the land. To that extent the Act 1 & 2 Vict. c. 110, is repealed. When the land is actually delivered in execution to the judgment creditor he becomes a secured creditor within the meaning of the *Bankruptcy Act*, 1869. In this case, the estate being leasehold, the land might have been taken under a *fi. fa.* but for the prior mortgage. The simple question is whether, by means of the order in the action appointing a receiver, the land was actually delivered in execution to the creditor by "other lawful authority" before the commencement of the liquidation? *Hatton* v. *Haywood* (1) and *Anglo-Italian Bank* v. *Davies* (2) shew that it was. Though in both these cases an *elegit* had been issued, the observations of the Judges, especially those of the Master of the Rolls in the latter case, tend very strongly to shew that since the *Judicature Act* the issue of an *elegit*, which was always a mere idle form in the case of a purely equitable interest in land, has become unnecessary.

[They were stopped by the Court.]

JAMES, L.J.:—

It appears to me that the judgment of the Chief Judge must be affirmed. The only real point in the case is whether either the first or the second order for the appointment of a receiver was really an equitable execution, an actual "delivery in execution by virtue of other lawful authority" within the meaning of sect. 1 of the Act 27 & 28 Vict. c. 112, as expounded by the decisions which have been cited. Beyond all question it was held in *Hatton* v. *Haywood* and *Anglo-Italian Bank* v. *Davies*, that an order appointing a receiver amounted to equitable execution. A jugdment creditor, not being able to obtain relief at law under the old system, because his debtor had nothing but an equitable interest in the land, came into a Court of Equity to obtain that relief which he could not obtain at law, and the moment he esta-

(1) Law Rep. 9 Ch. 229. (2) 9 Ch. D. 275.

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blished the difficulty in his way at law, and the Court made the order giving the right to the possession of the land to the receiver appointed on his behalf, that order giving the right to possession to the creditor through the receiver was as much a delivery in execution of land in which the debtor had only an equitable interest, as was the sheriff's return to the writ of *elegit* at law, that he had extended the land, a delivery in execution of land in which the debtor had a legal interest. That return was, equally with the appointment of a receiver, a merely verbal delivery in execution. Here there were, on the 14th of August, two orders in existence—the interim order, which covered the day, and the absolute order, which no doubt could not be considered as perfected until the security had been given by the receiver, but which was intended by the Master of the Rolls as that equitable execution which the creditor had come into the Court to obtain. It is true that the order might have been based on the creditor's title as mortgagee, but it is clear that it was not. It was based on the creditor's affidavit, which stated his judgment and the difficulty in the way of his enforcing it. He had before the commencement of the liquidation done all that he could do; he had obtained an order giving him equitable execution, and he was just in the same position as if he had got a return to a writ of *elegit* without any actual possession of the land. I am therefore of opinion that the decision of the Chief Judge was right.

Baggallay, L.J.:—

I am of the same opinion. It appears to me that the case is concluded by the decisions of the Court of Appeal in *Hatton* v. *Haywood* (1) and *Anglo-Italian Bank* v. *Davies* (2). The whole principle is well summed up in a passage of the judgment of Lord Justice *Cotton* in the latter case, with which I desire to express my entire concurrence. He said (3), "My opinion is that the appointment of a receiver is now delivery of execution by lawful authority within the meaning of the Act 27 & 28 Vict. c. 112, and that there is nothing whatever to prevent the Court from

(1) Law Rep. 9 Ch. 229. (2) 9 Ch. D. 275.
(3) 9 Ch. D. 293.

interposing on interlocutory motion." I think we are bound by the decisions of the Court of Appeal in those cases, with which my own opinion entirely concurs.

THESIGER, L.J.:—I agree.

The case is almost entirely covered by authority. It has been held that the appointment of a receiver in respect of equitable interests in land is equivalent to execution under a writ of *elegit* in respect of legal interests, and is an actual delivery in execution within the meaning of 27 & 28 Vict. c. 112, s. 1. Following the analogy of purely personal estates to which, by the preamble of the Act, it is stated that it is desirable to assimilate the law affecting freehold, copyhold, and leasehold estates, actual delivery in execution of interests in land constitutes the judgment creditor a secured creditor, within the definition of such a creditor given by the *Bankruptcy Act*, 1869, in sect. 16, sub-sect. 5; and he is not, as it appears to me, subject to any of the limitations to which a judgment creditor pure and simple is subjected by the provisions of the 13th section of 1 & 2 Vict. c. 110. Has there then, in the present case, been an appointment of a receiver in respect of the judgment debt such as would constitute an actual delivery in execution? Mr. *Romer* says there has not, on two grounds; first, that the form ought to be gone through of issuing a writ of *elegit* before jurisdiction can be founded for the appointment of a receiver, although that form would be absolutely inoperative upon an equitable interest, and therefore that, inasmuch as the order of the Master of the Rolls is capable of being read as referring only to the mortgage debt in respect of which he had admittedly jurisdiction, it ought to be so read; and, secondly, that the appointment of the receiver was not perfected, by reason of the person who was appointed not having given the security. I cannot accede to either of these contentions. When the order of the Master of the Rolls is looked at in connection with the affidavit upon which it was founded, it is clear to my mind that it was intended to relate, and did relate, to the judgment debt as well as the mortgage debt. And I may add, although it is not necessary absolutely to decide the point, that I most cordially assent to what was said by the Master of the Rolls in *Anglo-Italian*

C. A. 1879 *Ex parte* EVANS. *In re* WATKINS.

Bank v. *Davies* (1), that the issuing of a writ of *elegit* in the case of an equitable interest is a useless and absurd form. With regard to the other point, it appears to me that the giving of security by the person appointed receiver, although it formed part of the order, and was necessary to make it complete, was not one of the elements essential to render the order equivalent to a delivery of the land in execution. It appears to me that as soon as the order was made appointing a receiver it bound the land, in accordance with the decisions which have been cited, and that if the order was afterwards perfected by the receiver's giving security, it would relate back to the date when it was made. For these reasons I think the order of the Chief Judge was right, and that it must be affirmed.

JAMES, L.J.:—

I desire also to express my entire concurrence with what was said by the Master of the Rolls, that to require a writ of *elegit* to be issued now in the case of an equitable interest in land would be a mere idle form, and one which is wholly unnecessary now that there is only one system of judicature.

BAGGALLAY, L.J.:—

I also concur in what was said by the Master of the Rolls with reference to *Neate* v. *Duke of Marlborough* (2).

Solicitors for Trustee: *Hacon & Turner*, agents for *W. Beddoe, Aberdare.*

Solicitors for Judgment Creditor: *Bell, Brodrick, & Gray*, agents for *H. P. Linton, Aberdare.*

(1) 9 Ch. D. 285. (2) 3 My. & Cr. 407.

In re HULL AND COUNTY BANK.

C. A.
1879
Nov. 24.

TROTTER'S CLAIM.

Practice—Undertaking not to appeal.

A claim under a winding-up having been refused by the Master of the Rolls, the counsel for the liquidator asked the counsel for the claimant whether he intended to carry the case further, and on being informed that he did not, said that he should not ask for costs. An order was drawn up dismissing the claim without costs and not containing any undertaking not to appeal:—

Held, that as no undertaking not to appeal was embodied in the order, an appeal would lie.

THIS was an appeal by *Trotter* from a decision of the Master of the Rolls.

The *Hull and County Bank* being in course of winding up under supervision, *Trotter* carried in a claim as a creditor for 150 guineas. The case was adjourned into Court on the application of the liquidators. The Master of the Rolls disallowed the claim. Counsel for the liquidators then asked the counsel for the claimant whether he intended to carry the case further, and on being informed that he did not, said that in that case he should not press for costs. No notice of what had been said as to not carrying the case further appeared on counsel's brief, and the Registrar therefore declined to insert in the order any undertaking not to appeal, and the order was drawn up, passed, and entered simply as a refusal of the claim without costs. *Trotter* appealed. The counsel who had appeared for him at the Rolls did not hold a brief on the appeal.

Higgins, Q.C., and *Oswald*, for the Appellant:—

Trotter denies having authorized his counsel to give any undertaking not to appeal. Even if given by his authority, it could have been withdrawn at any time before the order was drawn up: *Rogers* v. *Horn* (1). Such an undertaking in order to be binding must be embodied in the order: *Seton* on Decrees (2).

(1) 26 W. R. 432. (2) 4th Ed. p. 31.

C. A. 1879 — *In re* HULL AND COUNTY BANK. — TROTTER'S CLAIM.

Davey, Q.C., and *W. Barber*, for the liquidators.

JAMES, L.J.:—

Since no undertaking not to appeal has been embodied in the order, the Appellant is not debarred from appealing; but the whole matter will be open, and if he is unsuccessful he may be ordered to pay the costs below. The appeal ought not to have been brought, for undertakings of this kind ought to be carried out in good faith.

BAGGALLAY and THESIGER, L.JJ., concurred.

The appeal was heard. The decision of the Master of the Rolls was affirmed on the merits, and the order varied by ordering the Appellant to pay the costs below as well as the costs of the appeal.

Solicitors: *E. Tillyard; Burton, Yeates, & Hart.*

C. A. 1879 — *Nov.* 27.

Ex parte PEARCE. *In re* GRIEVES.

Liquidation Petition—Meeting of Creditors—Proof—Voting—Contingent or unascertained Debt—Annuity under Separation Deed—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 16 (*sub-s.* 3), 31, 125 (*sub-s.* 2).

14 Ch D. 581

A debtor who filed a liquidation petition had, by a separation deed between himself and his wife, covenanted to pay to a trustee an annuity, during the joint lives of himself and his wife, for the maintenance of the wife and a child of the marriage. The annuity was to cease in case the husband and wife should cohabit again:—

Held, that, the value of the annuity not having been ascertained, the trustee was not entitled to vote in respect of it at a meeting of creditors under the petition.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

On the 2nd of November, 1878, a deed (being a separation deed between *Joseph Grieves* and *Adelaide Sophia* his wife) was executed between *Grieves* of the first part, his wife of the second part, and *Robert Pearce* of the third part. By this deed *Grieves*, in

consideration of certain covenants on the part of *Pearce*, covenanted for himself, his heirs, executors, and administrators, with *Pearce* (*inter alia*), that he would, during the joint lives of himself and his wife, pay to *Pearce*, his executors or administrators, as a provision for the maintenance of the wife and the maintenance, clothing, and education during his minority of an infant child of the marriage, an annuity of £156, to be considered as accruing from day to day and as commencing from the date of the deed. And it was declared that *Pearce*, his executors or administrators, should out of the annuity in the first place indemnify himself and themselves against any payment or liability which he or they might make or incur in consequence of the covenants by *Pearce* contained in the deed, and, subject thereto, should pay the residue of the annuity to the wife. And *Pearce*, in consideration of the covenants on the part of *Grieves*, covenanted with *Grieves* that the wife should not at any time thereafter molest *Grieves*, or in anywise compel or endeavour to compel him to cohabit with her, and that *Pearce* would indemnify *Grieves* against any debts or liabilities which the wife should thereafter incur. The deed provided that any breach of *Pearce's* covenants might be pleaded in bar and be available as a good defence to or set-off against any action for recovering the annuity or any part thereof accruing due after such breach. It was also provided that, if the husband and wife should thereafter by mutual consent cohabit as man and wife, then and from thenceforth the annuity should cease, and the covenants of *Pearce* should become void.

On the 1st of April, 1879, *Grieves* filed a liquidation petition. The first meeting of the creditors was held on the 17th of April. *Pearce* attended the meeting and proved a debt of £13 16*s.* 2*d.* on behalf of a firm of which he was a member. The creditors resolved to accept a composition of 4*s.* in the pound. The second meeting of the creditors was held on the 29th of April. *Pearce* again attended and for the first time tendered a proof for £1973, which he stated to be "for arrears due and the presumable value" of the annuity. He had filed an affidavit in which he said, "The provable value of such annuity by the Government Tables is £1973, the age of the said *Joseph Grieves* being 39 and the age of the said *Adelaide Sophia Grieves* being 33." The proof

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Ex parte PEARCE. *In re* GRIEVES.

was objected to by the debtor, "on the ground that no such debt is due or provable."

A resolution confirming the acceptance of the composition was proposed, and the question whether it had been duly passed depended upon whether the proof of *Pearce* in respect of the annuity ought to be admitted. The debtor's statement of affairs did not mention the name of *Pearce* as a creditor in respect of the annuity, or contain any reference to the debtor's liability upon his covenant to pay it. The Registrar ordered that *Pearce's* proof should be rejected for the purpose of voting, without prejudice to any application which he might be entitled to make under sect. 31 of the *Bankruptcy Act*, 1869.

Pearce appealed.

Rhys Davids, for the Appellant:—

The Registrar ought to have decided the question whether the value of the annuity was a provable debt, not to have reserved it: Bankruptcy Rules 1870, r. 271. The Appellant is prevented from voting upon the composition. Sect. 16, sub-sect. 3, of the Act does not apply, for this is not really an unliquidated or contingent or unascertained debt, the Appellant having sworn to the sum likely to be due: *Ex parte Ruffle* (1).

[JAMES, L.J., referred to *Mudge* v. *Rowan* (2).]

That case arose under the Bankruptcy Acts of 1849 and 1861, and the language of the present Act is different. *Mudge* v. *Rowan* has been in effect overruled.

[JAMES, L.J.:—As the debt was not included in the debtor's statement you are not bound by the composition: *Bankruptcy Act*, 1869, s. 126.]

Sect. 31 gives the right to prove such a debt: *Ex parte Llynvi Coal and Iron Company* (3); *Ex parte Blakemore* (4); *Ex parte Bates* (5).

Winslow, Q.C., and *M. R. Phillips*, for the debtor, were not heard.

(1) Law Rep. 8 Ch. 997.
(2) Ibid. 3 Ex. 85.
(3) Law Rep. 7 Ch. 28.
(4) 5 Ch. D. 372.
(5) 11 Ch. D. 914.

JAMES, L.J.:—

It appears to me that the Registrar's decision was quite righ . The Appellant was not in a position to have any sum fixed in respect of which he could vote at the meeting, the value of the annuity not having been ascertained. The value of a simple annuity for the joint lives of the husband and wife was clearly irrelevant. The annuity is subject to at least two contingencies; it is to cease if the husband and wife cohabit again, and also if the wife contracts debts from which *Pearce* does not indemnify the husband. The Appellant, acting on behalf of his *cestuis que trustent*, cannot be prejudiced by the rejection of his proof, for he is not bound by the composition, his name not being inserted in the debtor's statement of affairs.

BAGGALLAY, L.J.:—

I am of the same opinion. I will only add that in *Ex parte Bates* (1) there was a bankruptcy, not a composition.

THESIGER, L.J.:—

I also am of the same opinion, upon the ground that this was a debt the value of which had not been ascertained at the time of the meeting.

Solicitors for Appellant: *Baylis & Pearce.*
Solicitor for Debtor: *C. T. Foster.*

(1) 11 Ch. D. 914.

C. A. 1879 Nov. 27.

Ex parte SEWELL. *In re* SEWELL.

Debtor's Summons—Bonâ fide Dispute as to Debt—Solvent Debtor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 7.

The process of debtor's summons was not intended to be used where there is a solvent debtor and a *bonâ fide* dispute as to the debt.

If there is really no defence to the claim, the creditor ought to proceed by a specially indorsed writ under the *Judicature Act*.

ON the 13th of October, 1879, *J. Beale* issued a debtor's summons against *N. P. Sewell*, in respect of a debt of £167 17*s.*, which was alleged to be due for work and labour done and materials supplied to *Sewell* by *Beale*, who was a builder. *Sewell* applied to the Court to dismiss the summons, and filed an affidavit in which he said that he was not indebted to *Beale* in the amount claimed. Mr. Registrar *Hazlitt*, acting as Chief Judge, dismissed the application. *Sewell* appealed.

In the opinion of the Court of Appeal there was a *bonâ fide* dispute as to the debt, and there was no reason for doubting *Sewell's* solvency.

Graham, and *Ingham*, for the Appellant:—

When there is a *bonâ fide* dispute as to the debt, and a fair question for trial, the summons ought to be dismissed, or at any rate no security should be required: *Ex parte Shepherd* (1); *Ex parte Turner* (2); *Ex parte Latham* (3); *Ex parte Rowan* (4).

De Gex, Q.C., and *Yelverton*, for the creditor:—

The Registrar thought the case really an undefended one. Every question remains open to the debtor on the petition for adjudication: *Bankruptcy Act*, 1869, s. 8.

JAMES, L.J.:—

I think the proper order to make will be to stay the proceedings on the summons, on the terms of the Appellant's bringing the

(1) 10 Ch. D. 573.
(2) Law Rep. 10 Ch. 175.
(3) 4 Ch. D. 105.
(4) Law Rep. 9 Ch. 617.

sum claimed into Court to abide the result of an action. I think there was a *bonâ fide* dispute about the debt, and there is no insolvency. These summonses are always more or less vexatious when the man who is summoned is solvent. If there is no defence to an action, judgment can now be got very cheaply under Order XIV. of the Rules of Court, 1875, and that would be the reasonable course to pursue.

BAGGALLAY, L.J., concurred.

THESIGER L.J.:—

I agree that the proceedings on the summons ought to be stayed, and I do not dissent from their being stayed only on the terms of security being given. But I assent to that only because it appears to be in accordance with the previous decisions of this Court in cases in which the weight of the evidence is in favour of the creditor. But for those decisions I should have thought that the proceedings ought to be stayed unconditionally. Though the creditor may be within his strict right in issuing the summons, yet I think the provisions of the Act were not intended to apply where the debtor is solvent and has a *bonâ fide* defence to the claim. The *Bankruptcy Act* was not intended to be used to put the screw on a debtor. The right is given to issue a debtor's summons in respect of any debt of £50, but it was intended to be used only when the circumstances are likely to end in the bankruptcy of the debtor. It was not intended to make the Court of Bankruptcy a tribunal to decide ordinary actions of debt.

JAMES, L.J.:—

There will be no costs of the appeal. The costs of the proceedings in the Court below will abide the event. I hope parties will bear in mind what Lord Justice *Thesiger* has just said.

Solicitors for Appellant: *Monckton, Long, & Co.*
Solicitor for Creditor: *G. H. Carthew.*

C. A. 1879

Nov. 7, 8, 17, 18, 21; *Dec.* 1.

NORTON *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

[1875 N. 13a.]

Railway Company—Superfluous Land—Abandonment—Lands Clauses Consolidation Act, 1845, *s.* 127—*Statute of Limitations* (3 & 4 *Will.* 4, *c.* 27), *s.* 2.

14 Ch D 538
9 QBD 429
14 Ch D 3, 6

A railway company in 1838 bought part of a field under the powers of their Act, and erected a post and rail fence on the boundary. They then made a ditch within the fence, and threw up a bank on which they planted a quickset hedge at the distance of 4 ft. 6 in. from the fence. As the hedge grew up the fence was allowed to fall into decay, and about the year 1846 it was removed. From the year 1854 up to the commencement of this action in 1875, the strip of land between the quickset hedge and the site of the fence was occupied and cultivated with the remainder of the field, partly as an arable field and partly as garden-ground, the railway company in no way interfering with it except that their workmen went over it to trim the hedge:—

Held (affirming the decision of *Malins*, V.C.), that the circumstances conclusively shewed the strip between the hedge and the line of the post and rail fence to be superfluous land within the meaning of the *Lands Clauses Consolidation Act*, 1845, s. 127, and that it had therefore vested in the owner of the rest of the field, and moreover (notwithstanding *Searby* v. *Tottenham Railway Company* (1)) that the owner of the rest of the field had had such a possession of the strip in question as was sufficient to extinguish the title of the company under the *Statute of Limitations*.

THIS was an appeal by the Defendants from a decision of Vice-Chancellor *Malins* (2).

In 1860 Sir *Charles Adderley* granted a lease to the Plaintiff of a piece of land at *Saltley*, near *Birmingham*, described as "adjoining on the southern side thereof to the *London and North Western Railway*."

The land over which this part of the line of the railway was made had been taken by the company from Sir *Charles Adderley* in 1838. The company at first fenced off their land by a post and rail fence, and then planted a quick hedge within it. The company alleged that when they took possession they had formed a ditch upon their land immediately within the post and rail fence, thrown up the soil thus excavated into a bank, and planted their

(1) Law Rep. 5 Eq. 409. (2) 9 Ch. D. 623.

quickset hedge on the top of the bank at a uniform distance of 4 ft. 6 in. from their posts and rails, and they claimed the soil as theirs to the extent of 4 ft. 6 in. from the middle of the hedge. The Plaintiff on the contrary contended that the ground up to the hedge formed part of the property demised to him.

The Plaintiff, in 1861, built a public-house upon the land demised to him. In 1875 the company erected on the northern side of the hedge, within 4 ft. 6 in. from the middle of the hedge, a hoarding, for the purpose of obstructing the access of light to the windows of the public-house, which looked over the railway. This hoarding, after the commencement of the action, was blown down.

The Plaintiff brought his action claiming damages for the company having trespassed on his land by digging holes in it, and erecting poles and hoarding and posts thereon, and damages by reason of the company having obstructed the access of air and light to the hotel. The Plaintiff also claimed an injunction to restrain the company from re-erecting the hoarding or any other similar hoarding, so as to interfere with the access of light and air to the Plaintiff's premises, and from trespassing on the Plaintiff's land. The action also asked for relief on the ground of nuisance by smoke.

The company by their defence alleged that the ground on which the hoarding was erected belonged to them, and by way of counter-claim they claimed to have possession of the strip of land between the hedge and a line at the distance of 4 ft. 6 in. from the middle line of the hedge delivered up to them, it being at the time used as part of the Plaintiff's garden.

There was a singular conflict of evidence on the question whether the company had ever formed a ditch and bank as they alleged. Their evidence that they had done so was of a very clear and precise description, such as, if uncontradicted, would have left no doubt upon the question. On the other hand, evidence, to all appearance equally clear and satisfactory, was adduced by the Plaintiff to shew that no ditch had ever existed on the north side of the hedge.

A former tenant of part of the Plaintiff's land deposed that in 1856 he became tenant of a piece of land fourteen yards wide

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forming the southern part of it, that at that time there were no posts or rails, and the land was ploughed up to the hedge, and that when he took possession he made a garden of the ground and cultivated it up to the hedge, and that he trimmed the hedge, but that if he omitted to do so the company did it. Another witness deposed that he had known the fence about twenty-six years, and that during that period there had been no posts or rails. He went on to say that there had been a public footpath running along the southern side of the land now occupied by the Plaintiff, and that it ran close to the hedge, and that when it was stopped, which was about twenty-four years ago, the whole of the land up to the hedge was occupied and used by the then tenant for agricultural purposes. There was other evidence to the same effect. The footpath above referred to was in substitution for a path which had crossed the field. This evidence was not contradicted. It was not alleged that the railway company had exercised any rights of ownership over the disputed strip for more than twenty years, unless their going over it to trim the north side of the hedge was to be so regarded.

Vice-Chancellor *Malins* granted a perpetual injunction to restrain the company from re-erecting the hoarding mentioned in the statement of claim, or any similar hoarding, so as to interfere with the access of light or air to the Plaintiff's premises in the statement of claim mentioned, and from trespassing on the Plaintiff's land in the same statement mentioned. An injunction was also granted as to the smoke nuisance mentioned in the former report, and inquiries were directed as to damages from the wrongful acts complained of. The counter-claim was dismissed.

The company appealed. The arguments on the question whether the company, supposing them to be owners of the disputed strip, were at liberty to erect the hoarding, are omitted, as the Court of Appeal did not give any judgment on this point. At the suggestion of the Court it was arranged that the Plaintiff should begin and open his case.

J. Pearson, Q.C., and *Romer*, for the Plaintiff:—

For upwards of twenty years the hedge has been the only visible boundary of the Defendants' property. If it is not their real

boundary they have been violating their Acts, which bind them to keep their property sufficiently fenced off, the provisions being similar to those in the general Act. They cannot now be heard to say that the apparent boundary is not the true boundary. This land, if it ever belonged to the railway company, has not been used by them for more than twenty years, and must have revested in the adjoining owner as superfluous land. Then, apart from this, the company have been out of possession, and the Plaintiff and his predecessors in title in possession, of this strip for more than twenty years, and the right of the company, if it had one, is barred by the *Statute of Limitations*.

Glasse, Q.C., *Herschell*, Q.C., and *Speed*, for the company:—

As regards the question whether this strip revested as superfluous land, the case of *Betts* v. *Great Eastern Railway Company* (1) is important. It was there held, and the decision has recently been affirmed by the House of Lords, that land is not superfluous merely because it has not actually been used for the purposes of the railway, and according to the doctrine laid down a small strip of land alongside a railway can hardly ever be superfluous. Then as regards the *Statute of Limitations*, the mere being out of possession without any one else being in possession does not bar a right: *Smith* v. *Lloyd* (2).

[JAMES, L.J.:—But suppose the adjoining owner cultivates the land up to the fence?]

That is not enough to oust the true owner: *Searby* v. *Tottenham Railway Company* (3).

J. Pearson, in reply:—

This land has been abandoned by the company as land for which they have no use, and must be considered superfluous land: *Great Western Railway Company* v. *May* (4).

(1) 3 Ex. D. 182.

(2) 9 Ex. 562.

(3) Law Rep. 5 Eq. 409. On the 29th of November, 1879, after judgment had been given in *Pilling* v. *Lancashire and Yorkshire Railway Company*, in the argument of which this case had been cited, the Lord Justice *James* said: "As at present advised, I do not agree with the decision in *Searby* v. *Tottenham Railway Company*."

(4) Law Rep. 7 H. L. 283, 292.

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NORTON v. LONDON AND NORTH WESTERN RAILWAY CO.

Dec. 1. JAMES, L.J., delivered the judgment of the Court (*James*, *Baggallay*, and *Thesiger*, L.JJ.) as follows:—

The Defendants entered upon land which was undoubtedly in the actual possession of the Plaintiff and there erected a great hoarding almost close to the Plaintiff's windows, and so as completely to obstruct all access of light and air to them. They were not ancient windows, so that there is no question of legal right to the easement of light and air. The Defendants justify the alleged trespass by averring that the place where they so erected the said hoarding was their own soil and freehold. The burden of proving the averment is therefore upon them; and the Vice-Chancellor has found that they have failed in establishing their case. Their evidence in support of it is substantially this—that they originally acquired from the owner of the *Adderley* estate ground for the construction of their railway and works, and that they, on the boundary of such ground, made a post and rail fence, inside of which they made a ditch, and on a bank formed out of the materials from such ditch planted a quickset fence at a distance of 4 ft. 6 in. from the fence. The post and rail fence disappeared more than a quarter of a century ago, as has also the ditch, if it ever existed. But the quickset grew into a thick, strong, substantial hedge, which is still *in situ*, and, measuring 4 ft. 6 in. from the centre of that hedge, the spot where the alleged trespass was committed would undoubtedly fall within the original boundary of the Defendants' land. But upon this question of fact, as to whether there ever was any such ditch or any such distance as 4 ft. 6 in. between the line of the hedge and the line of the posts and rails, there is the most complete, the most extraordinary conflict of parol evidence. Witness after witness on the part of the Defendants depose to the actual construction of the ditch and the bank of earth; while, on the other hand, witness after witness who lived on the ground and who worked on the ground, and others who daily traversed the ground going to and fro in their occupation, depose positively that there never was any such ditch; and other expert witnesses swear positively that the supposed site of the ditch is the undisturbed natural stratum of subsoil. These witnesses were cross-examined before the Vice-Chancellor, and that learned Judge, who had the opportunity of seeing them, came to

the unhesitating conclusion that there never was any such ditch, and that there was no such distance as 4 ft. 6 in. between the line of the hedge and the posts and rails. And it is sufficient for us to say that we see no reason for saying that the finding of the Vice-Chancellor on this question of fact is not warranted by the evidence, and to say that the Defendants have not succeeded in establishing that the acts complained of were done within the line even of their original boundary.

But we do not think it important to dwell further on this question of the original boundary, for we think that the question of the present legal title to the space, and to every part of the space outside the quickset hedge, depends on the history of the dealings with the property subsequent to the original purchase by the Defendants, and that history is established by evidence beyond all reasonable doubt, and hardly contradicted by the Defendants in any essential particular. It appears that as soon as the quickset hedge had grown to be a sufficient fence, the posts and rails were neglected by the company. As far back as the year 1846 they had become absolutely ruinous, and the then occupier of the adjoining land caused their remains to be carted away to his house. He then diverted a footpath which had previously traversed his field to the ground immediately close to the fence, and that footpath, so appropriated by the adjoining occupier in substitution for the former path, was used by the public for several years. But some time afterwards, and certainly before the year 1854, that footpath became unnecessary and was stopped up, and from that time the whole space up to the quickset hedge was taken into the adjoining land, and held, occupied, and cultivated therewith, partly as an arable field and partly as garden-ground. The Vice-Chancellor came to the conclusion that the Defendants had abandoned the land—that is to say, not merely that they had no occasion for the time to make, and therefore did not make, any beneficial or practical use of it, but that they abandoned the actual and legal possession of it to the occupiers, who did take such actual and legal possession of it. If they did not mean so to abandon it, if they did not mean that the visible boundary, the hedge, should be the real boundary, they were clearly violating their statutory duty of maintaining a proper fence between their land and their neigh-

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bours'. It is difficult, in fact, to conceive any more complete or conclusive evidence that the land in question was surplus land within the meaning of the *Lands Clauses Act* (which was retrospectively incorporated with the Defendants' original Act), and, therefore, vested in the adjoining owner, or to have a more complete case of possession, sufficient under the *Statute of Limitations* to extinguish the Defendants' title. For it is impossible in our judgment to hold that the annual stepping over the hedge to clip and trim it, and the annual clipping and trimming thereof, was any retainer of actual possession, or any evidence that the land was not actually surplus land and given up as such. The hedge was undoubtedly the Defendants' fence, and it was their statutory duty (a duty which they owed especially to the adjoining occupier) to keep the same in proper repair, order, and condition, and their going upon his side of the fence for the purpose of performing their duty to him, and for no other purpose, cannot be held to be in any way a derogation of the proprietary and possessory rights of the adjoining proprietor and occupier. At the most it might amount to evidence of the easement required for the purpose of maintaining the hedge. We see, therefore, no ground for differing from the conclusion at which the Vice-Chancellor has arrived—that the Defendants have wholly failed to establish their defence or their counter-claim in respect of the ownership of any ground outside their quickset fence, and therefore such defence and counter-claim have wholly failed.

It was suggested that the Plaintiff's lease did not give him the whole land up to the fence, but left a small strip unincluded. But if the Defendants had, as we hold they had, ceased to be entitled to any part of the land, they have nothing to do with the Plaintiff's title. His possessory right is sufficient against the trespasser.

But then another case was argued, and was, in fact, the main subject of argument, both in the Court below and in this Court—that is to say, this hypothetical case was made the subject of much able and learned discussion, both by the counsel and the Vice-Chancellor—viz., assuming that the hoarding was actually on the Defendants' land, had they, having regard to their character and position as a public body incorporated for the sole

purpose of making and using a railway, the same right of erecting a hoarding, obstructing the access of light and air to the modern windows of the Plaintiff, which an ordinary proprietor in fee simple would undoubtedly have? The Vice-Chancellor decided that they had not, and has granted an injunction which would prevent their erecting a similar hoarding, if they should be able and minded to do so, clearly within their own limits. They have not yet done so. The discussion involved a great number of questions. There was, first, the question, Has the company the right to erect such a hoarding at its own will and pleasure as any other proprietor has to do what he likes with his own? If not, Has the company a right to do it, with the view and for the purpose of preventing the acquisition of an indefeasible easement? Has it that right *simpliciter* whenever a new window is opened, and as soon as it is opened, or has it that right only when it is possible, or only when it is reasonably probable, that the acquisition of such an indefeasible easement might or would interfere with the erection of a station or other work, which might or would be possibly or probably required at some future time; and then, in connection with the next question, the discussion branched off into the problems following:—Would a user of lights for twenty years give the owner of them an absolute right to forbid such new works, or only a right to compensation as a person injuriously affected? and would such a user give any indefeasible or other right whatever to a vendor (or his assigns) who had sold his land to the company for the purposes of the railway and had accepted full compensation for his land and for all consequential damages? The Vice-Chancellor's decree has established the Plaintiff's possessory right in the strip of land, and has given him an inquiry as to damages and the costs of the suit, and we propose to confirm his decree in that respect. The action was an action of trespass, and the hypothetical or alternative case of the act complained of being a violation of implied statutory prohibition if it should be held to be no trespass, is not raised, or, if raised, is raised in the most shadowy way in the pleadings. We do not think it necessary or desirable that we should in this case determine any of the abstract propositions of law above shadowed forth. If the company should be, at

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any time before the expiration of the requisite twenty years (and they have some time yet before them in which they need not harass the Plaintiff), minded to raise the question or questions of law with reference to this particular building, they may be raised unencumbered by the disputed facts and conflicting evidence which have swollen this case, and possibly upon a wholly undisputed state of facts. We propose, therefore, to leave the determination of those questions to a future time and occasion, if and when it shall become necessary to determine them, and when it shall be more clearly seen whether there is any practical possibility of the easement doing the company any harm. Possibly, seeing that such questions are of great national importance, affecting, on the one hand, all the railway companies in the kingdom, and, on the other, all the landowners' frontages on their lines, the Attorney-General may think it right to take the necessary steps to keep railway companies within the limits of their parliamentary duties, if they should be really transgressing those limits by obstructing the free passage of light and air over the public highway. We propose, therefore, to relieve the Plaintiff (who has had sufficient litigation already) from the necessity of contesting further in this case the grave general questions of law, which have not yet arisen in fact, by limiting the injunction to the erection of any similar hoarding on his (the Plaintiff's) land—that is to say, on any land outside the quickset fence of the railway. There was a minor question about the smoke nuisance, about which it suffices to say that we see no ground for differing from the Vice-Chancellor. With the slight alteration which I have mentioned as to the injunction the decree will be affirmed, and the Appellants must pay the costs of the appeal.

Solicitors: *Clarke, Woodcock, & Ryland; R. F. Roberts.*

LORD ROKEBY *v.* ELLIOT.

C. A.
1879
Dec. 1, 2, 16.

[1872 R. 21.]

Mining—Winning—Apportionment—Interest.

By a deed of grant and license the licensee was allowed to win and work all and every or any of the coal mines, seam and seams of coal, within certain lands, and, in the first place, out of the profits to reimburse himself all expenses incurred in the winning thereof; and it was provided that, after repayment of all expenses of winning the said colliery, coal mines or coal mine, seam or seams of coal, he should pay such royalty as should from time to time be awarded by two arbitrators to be named by the parties respectively. There were three seams of coal under the land. The licensee reached one of them by a driftway from an adjoining colliery and worked the coal. He afterwards, by similar means, reached and worked another of them. The third was also reached, but was abandoned as worthless:—

Held (affirming the decision of *Fry*, J.), that the coal was won according to the meaning of the deed so soon as the first seam was reached through the driftway so that it could be worked, and that the deed did not contemplate a distinct winning in respect of each seam; and that, therefore, expenses incurred after the first seam had been reached could not be treated as expenses of winning.

The licensee mixed the coals gotten under the license with those gotten from his own colliery and sold them together. He alleged that the coals gotten under the license were inferior in value to the other coals:—

Held (affirming the decision of *Fry*, J.), that as they had been mixed by the licensee's own act, he was not entitled to an inquiry as to how much the selling price of the coals was diminished by the mixture of the coals gotten under the license:

Held (varying the decree of *Fry*, J.), that interest at £5 and not £4 per cent. ought to be allowed on the expenses of winning.

Reversed by H. L. 7 App Cas 43 H. L.

THIS was an appeal by the Defendants from a decision of Mr. Justice *Fry* (1).

Kay, Q.C., *North*, Q.C., and *Williamson*, for the Appellants:—

We say that the coal was not won till the year 1870, when the ventilating shaft, which was necessary for the safe working of these mines, was completed. We contend, further, that the three seams of coal are to be treated separately, and that the seams were not to be treated as all won when the first seam was reached. We

(1) 9 Ch. D. 685.

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further say that even if the decree is right in other respects, the Defendants ought to be allowed interest at the rate of £5 instead of £4 per cent., and that the coal which has been got from this colliery being of an inferior quality to that got from the Defendants' other mines, ought not to be treated as having been sold at the average price got for the whole of the coal which the Defendants have disposed of.

Cookson, Q.C., and *H. A. Giffard*, for the Plaintiff:—

We submit that the decree is right in treating the coal as won when it was so reached that it could be gotten, and that the winning cannot be treated as suspended till the completion of the shaft, which was not begun until a large quantity of coal had been gotten. The proviso treats the winning as one act to be done once for all, and it would be an unnatural and inconvenient construction to hold that there are separate winnings for separate seams. The Defendants have mixed the coal, so that the price of the coal from this colliery cannot be distinguished, and by their answer they treat the coal as sold at the average price; there ought not, therefore, to be any inquiry for the purpose of apportioning the price.

Kay, in reply.

Dec. 16. JAMES, L.J., now delivered the judgment of the Court (*James*, *Baggallay*, and *Thesiger*, L.JJ.):—

In the year 1775 Mr. *Tempest* was the owner of three-fourths and Mr. *Montagu* the owner of one-fourth of the property known in this suit as the *Barmston* property. Mr. *Montagu*, by an indenture dated the 7th of March, 1775, conveyed his fourth to Mr. *Tempest*, reserving the minerals, with respect to which however the deed contained the following provisions:—[His Lordship read the proviso set out in the previous report.]

The Plaintiff represents Mr. *Montagu*. Mr. *Tempest's* interest became vested in the Marchioness of *Londonderry*. By an indenture dated the 5th of November, 1864, the Marchioness demised the minerals to the Defendants subject to Lord *Rokeby's* interest

therein. And it has been agreed by both sides that for the purposes of this suit the Defendants represent Mr. *Tempest*, and that the questions between them are to be determined as they would have been between Mr. *Tempest* and Mr. *Montagu*. The Defendants being the owners or lessees of an adjoining coal-field working three veins, have from such adjoining coal-field worked to the three veins, and (one of them proving worthless) have worked the other two and extracted therefrom coal to the extent of hundreds of thousands of tons, and the question between the parties is whether and when the time arrived at which Lord *Rokeby* became entitled to have his quinquennial royalty or tentale fixed under the deed, and that resolved itself into a question when the winning was made according to the true intent and meaning of the deed. The Judge in the Court below was of opinion that such winning was made on the 15th of July, 1864, when the first seam was reached and began to be worked. He adopted the definition of winning given in the case of *Lewis* v. *Fothergill* (1).

The main contention on the part of the Defendants was that it was a necessary part of the winning foreseen from the first, and part of the original scheme and plan of winning, that there should be a shaft sunk to provide for the additional ventilation rendered necessary by the fiery character of the coal in this property, and that although that shaft was not begun until the year 1867, after the coal had been very extensively worked, and not completed until the year 1870, by which time nearly 400,000 tons had been extracted, the winning is not to be considered as made until the shaft had been so completed. We should be unable to concur in that contention even if the fact had been made out, which we think it is not, that there was any such original plan and scheme. We think the definitions of winning given in the case of *Lewis* v. *Fothergill* are accurate, as accurate as definitions can be of a term like winning, which probably is itself as intelligible and plain as any definition can be.

A coal-field is won when full practicable available access is given to the coal hewers so that they may enter on the practical work of getting the coal. And this was certainly true of the

(1) Law Rep. 5 Ch. 103.

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principal seam on the day fixed by the Judge. But another contention was made that each seam was to be treated distinctly, and that the provisions of the deed were to be applied to each seam as if they were separate collieries. Neither of the parties seemed, however, to be quite sure for whose benefit such a distinction, if made, would enure. It is more than doubtful whether it would be for the benefit of the Defendants. But we agree with the learned Judge that that construction (which would lead to the most inconvenient results) is not the true construction of the deed. It would require distinct accounts of the winning and of the subsequent workings and of the profits and distinct arbitrations to fix distinct royalties for distinct quinquennial periods. It is possible and easy to conceive workings of several veins or several portions of the coal-fields so entirely separate as to make it right and proper that there should be such distinct accounts, distinct arbitrations, and distinct royalties. But we do not think that is so where the seams are won to be worked together, and are worked together as one colliery. This contention is in truth wholly inconsistent with the main contention of the Defendants that the whole constituted one winning not completed until the new shaft for ventilation was completed. And in fact until the hearing no such suggestion appears or was thought of. The coals from both seams were sold together, and the schedules to the answer treat the winning as one winning and the produce as the produce of one colliery, just as all the veins in the adjoining liberty are one colliery, and just as the three veins are one entire taking as between Lord *Vane* and the Defendants. Nor is there in this any hardship or injustice to the Defendants, for where the winning expenses end the working expenses begin, and the working expenses, not included in the winning, would of course have to be charged against the produce of the coal in ascertaining the profits. The exact time at which the royalty is to begin is when the produce of the sales has recouped all the expenditure. At that time the new relation between the parties is to commence. Up to that time all the expenses and all the sums realized belong to the common fund. From that time all the expenses and all the sums realized belong to the assigns of Mr. *Tempest*, subject to the payment of such royalty as arbitrators should fix, having regard to all the cir-

cumstances of the case and the mining prospects of the coal-field. It may be that in the first year or years the total expenses of winning and working might be comparatively small and the sums realized very great, so as soon to balance the account and bring the royalty into existence, and that immediately afterwards, from the change in the coal-field, from the exigencies of the work, from the vicissitudes of the market, the expenses might become very great and the results very small, so that a royalty would be payable while the work was being prosecuted, not only without profit, but at a loss. On the other hand, it might take years before the winning expenses are recouped, and then things might so change that with a very small royalty large profits would be realized. But these are the chances of every such work, and Mr. *Tempest* took upon himself those chances for better or worse.

In the view we take of the case the declarations in the first part of the decree become of little, if any, importance. Practically, as accounts of the winning expenses and accounts of the working expenses have to be taken, it will be found, we think, to resolve itself in great measure into a mere account of payments and receipts, so as to ascertain whether and when the receipts exceeded the payments. If that date should be found to be anterior to some heavy expenditure by the Defendants, so much the worse for them; if, on the other hand, it should be found that there was a pound undischarged when such new expenditure was incurred, so much the worse for the Plaintiff, as the account must be open until a balance of payments and receipts is arrived at. It will not be absolutely a simple account of payments and receipts, for a proper allowance and deduction would have to be made in respect of any machinery, plant, and other effects which at the dividing date would be available for the continued working, and which, of course, would be the property of the Defendants. And a portion—probably a large portion—of the working expenses would have to be ascertained by some apportionment between the two coal-fields, which were worked together.

The Defendants complain of two other parts of the decree—one, that which allows interest at 4 per cent. only, and the other which charges them with the actual sale prices of the coal. As to the first, which is of small importance, it is to be borne in mind

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that in mercantile matters, in matters of industrial speculation, the ordinary rate of interest as understood by men of business, the one which would be given by a jury, is 5 per cent., and we think that ought to be given in such a case as the present. The other complaint arises thus:—It is alleged that the coal got from the property in question was inferior to the coal got from the Defendants' other coal-field, but that it was all mixed and sold together at one price. And it is contended that the price of the mixture ought to be analyzed and divided between the two qualities of coal, according to such qualities. But the learned Jndge was of opinion that the coals having been so mixed by the Defendants' own act, it is not open to them to compel the Plaintiff to go into an inquiry as to how much the price of the mixed mass was diminished by the admixture. If it was not diminished, there is nothing to apportion; and we agree with him in this respect. Moreover, the Defendants themselves in the schedule to their answer have professed to give the sale prices of the coal and to charge themselves with such prices. Such sale prices must, of course, mean the actual prices paid by the purchasers, and not any hypothetical price, deduced by a calculation based on such actual prices and the proportions of the coal mixed. They have, therefore, determined this question for themselves. The result is that the judgment will be affirmed, with the variation as to interest, which does not affect the costs, and the Appellants must pay the costs of the appeal.

Solicitors: *Frere & Co.; Williamson, Hill, & Co.*

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Feb. 24, 25.
C. A.
Dec. 2, 5.

[1877 B. 363.]

Ancient Lights—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *s.* 3—"*Consent or Agreement.*"

K., the owner in fee of a freehold house, in 1814 put out four new windows, and signed and gave to *S.*, the owner in fee of an adjacent freehold house overlooked by those windows, a document declaring that they were put out and remained upon the leave of *S.*, and that he, *K.*, would, on the request of *S.*, or his heirs or assigns, at any time thereafter block up the same, and in the meantime would pay *S.*, his heirs and assigns, sixpence a year for the indulgence. This document was not signed by *S.* The rent was paid down to 1859. In 1877 *S.'s* successor in title called upon *K.'s* successor in title, who had bought the property in 1865 with notice of the document, but had never paid any rent under it, to block up the four windows, and proceeded to obstruct the access of light to them. *K.'s* successor in title thereupon brought this action against him for an injunction, claiming to have acquired an indefeasible right to the access of light to the four windows by actual enjoyment for twenty years without intermission :—

Held, first, that the enjoyment of light by *K.* and his successors had been by virtue of the document of 1814, and that such document, although signed by *K.* only, was a consent or agreement expressly made or given for the purpose of such enjoyment within the meaning of the 3rd section of the *Prescription Act*, so as to prevent *K.* and his successors from acquiring any right to the access and use of light under that section; and secondly, that the agreement, having been acted upon by payment of rent thereunder to within twenty years from the commencement of the action, was enforceable in equity irrespective of the statute.

It was proved that in 1859 the agent of the owner of *S.'s* tenement paid to him sixpence, stating verbally that it was for the lights in *G.'s* house (the house which had belonged to *K.*) :—

Held, that, the agent being dead, this was evidence of payment of the rent by *G.* in 1859.

ON the 15th of August, 1814, *Isaac Kirkbride*, the owner in fee of a house, No. 71, *King Street*, *Whitehaven*, having then lately opened, in the upper part of his house, four new windows overlooking an adjacent house, of which *Henry Spencer* was owner in fee, signed and delivered to *Spencer* a document in the words following :—

"Whereas I, *Isaac Kirkbride*, of *Whitehaven*, in the county of *Cumberland*, cabinet maker, have lately put out four windows or

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lights from my shop or premises in *King Street*, in *Whitehaven* aforesaid, which face into or overlook the backyard or grounds of a dwelling-house and premises late the property of *John Pearson*, of *Staple Inn, London*, gentleman, but now of *Henry Spencer*, of *Whitehaven*, aforesaid, weaver, Now I do hereby declare that those windows or lights above mentioned are put out and remain upon the leave or indulgence of the said *Henry Spencer*, and that I will, upon the request of him or his heirs or assigns to be made at any time hereafter, wall or block up the same, and in the meantime, until such request is made as aforesaid, I hereby promise to pay unto the said *Henry Spencer*, his heirs and assigns, the sum of sixpence yearly and every year, to commence and take effect from the day of the date hereof in consideration of such indulgence.

"Dated the 15th day of August, in the year of our Lord, 1814.

"Signed, *Isaac Kirkbride.*

"Witness, *Christr. Hobson.*"

This document was not signed by *Spencer*.

It was not disputed that the rent of sixpence a year was paid to *Spencer* under this document down to the year 1854, though any later payment was disputed by the Plaintiff. As to later payments, Mrs. *Atkinson*, wife of the Defendant and daughter of *Thomas Walker*, who, from 1857 to his death in November, 1861, was owner of the messuage formerly belonging to *Spencer*, deposed as follows:—

"I have been informed by my late father, and believe that the said payment of 6*d.* was made by the said *Eleanor Gibson*" (the then owner of *Kirkbride's* house) "to the said *Joseph Fowler* (as agent for my said late father) in the years 1858 and 1859, and I well remember being present in the latter year when the said *Joseph Fowler* came to my father's house and paid him 6*d.* in my presence, saying it was for the lights in Mrs. *Gibson's* (now Plaintiff's) property."

There was no other evidence of any payment subsequent to 1854.

Fowler died in the year 1860.

In the month of October, 1865, the father of the Plaintiff bought the house, No. 71, *King Street*, at a sale by auction, as the

Plaintiff alleged, without notice of this document. It was, however, proved by the evidence that it was brought to the notice of the Plaintiff's father both in the sale-room at the time of the auction, and afterwards during his investigation of the title.

In December, 1871, the Plaintiff's father died intestate, leaving the Plaintiff, an infant, his eldest son and heir-at-law.

On the 5th of July, 1877, the Defendant, who was the successor in title to *Spencer*, after giving notice to the Plaintiff to block up the four windows to which the above-mentioned document referred, built a wall preventing the access of light to them, and thereupon the present action was brought for an injunction to restrain the Defendant from blocking up and obstructing the light and air to the four windows in question, for a mandatory injunction ordering the Defendant to pull down the obstruction he had erected, and for damages. By his pleadings and at the Bar the Plaintiff claimed to have used and enjoyed the four windows and the access of light and air thereto for upwards of twenty years and to have accordingly acquired an indefeasible title thereto under the *Prescription Act*, 2 & 3 Will. 4, c. 71, s. 3 (1).

The action came on for trial before Vice-Chancellor *Hall* on the 24th of February, 1879.

Karslake, Q.C., and *T. A. Roberts*, for the Plaintiff:—

The document of the 15th of August, 1814, is not such as to bring the case within the exception in the 3rd section of the *Prescription Act*, 1832. To be within the exception the consent or agreement must be signed by the person against whom the enjoyment is to run—*i.e.*, the owner of the servient tenement, and not, as here, only by the person in whose favour it is to run. The mere payment of money for the permission to enjoy light is no interruption of the enjoyment. Moreover, this document was only a personal undertaking by *Kirkbride* with *Spencer*, his heirs and

(1) This section is as follows:—

"3. And be it further enacted that when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

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assigns, not intended to extend beyond *Kirkbride's* life, or to bind any other person. The document, then, not being within the exception, the Plaintiff has, by enjoyment without interruption for the period of twenty years, acquired an absolute and indefeasible title to the access of light through these windows: *Plasterers' Company* v. *Parish Clerks' Company* (1); *Flight* v. *Thomas* (2); *Mayor of London* v. *Pewterers' Company* (3); *Salters' Company* v. *Jay* (4); *Truscott* v. *Merchant Taylors' Company* (5); *Gale* on Easements (6); *Dart's* Vendors and Purchasers (7).

Dickinson, Q.C., and *Ingle Joyce*, for the Defendant:—

The only enjoyment here has been under and by virtue of the document of the 15th of August, 1814, which is a consent or agreement within the exception, for the Act does not require that the consent or agreement shall be made or given by the owner of the servient tenement. This document was expressly given for the purpose of enjoyment, in order to prevent one tenement from acquiring an easement over the other; and it was given by the person liable to the obligation and the burden of it, and against whom an action for the specific performance of the agreement would be brought, whose signature therefore of the obligation must be of greater effect than the signature of the person entitled to enforce it.

The authorities referred to have no bearing upon a case where the enjoyment has been by consent. The agreement was with *Spencer*, his heirs and assigns, and its operation cannot be limited, as the Plaintiff contends, to the life of *Kirkbride*. Moreover, it is an agreement which, having been acted upon and partially performed by payment of rent, would be recognised and enforced by this Court independently of the *Prescription Act*.

[They referred to *Gale* on Easements (8); *Bailey* v. *Appleyard* (9); *Carr* v. *Foster* (10); and upon the question of the notice which the father of the Plaintiff had of the existence of

(1) 6 Ex. 630.
(2) 11 A. & E. 688.
(3) 2 Mood. & Rob. 409.
(4) 3 Q. B. 109.
(5) 11 Ex. 855.
(6) 5th Ed. p. 174.
(7) 5th Ed. p. 357.
(8) 5th Ed. p. 581.
(9) 8 A. & E. 161.
(10) 3 Q. B. 581.

the agreement, they cited *Tulk* v. *Moxhay* (1) and *Piggott* v. *Stratton* (2).]

Karslake, in reply:—

No acknowledgment by the owner of the damaging tenement can be a consent or agreement within the statute.

[HALL, V.C.:—Surely this agreement is enforceable. Chief Baron *Pollock*, in *Frewen* v. *Philipps* (3), says: "It may be that if a man opens a light towards his neighbour's land the reversioner may have no means of preventing a right thereto from being acquired by a twenty years' enjoyment, unless he can prevail upon his tenant to raise an obstruction, or is able to procure from the other party an acknowledgment that the light is enjoyed only by consent."]

Payment of rent has been held to be no interruption within the statute, and actual payment is surely a much greater thing than any mere acknowledgment by the paying person. [He referred to the *Plasterers' Company* v. *Parish Clerks' Company* (4), *Mayor of London* v. *Pewterers' Company* (5), *Flight* v. *Thomas* (6), and *Truscott* v. *Merchant Taylors' Company* (7).]

HALL, V.C.:—

This case raises a question of considerable importance upon the construction of the *Prescription Act*, but before dealing with that question I shall consider how the matter stands upon the evidence. [His Lordship then went through the evidence, held it to be proved that the Plaintiff's title was sufficiently deduced from *Isaac Kirkbride*, and the Defendant's from *Henry Spencer*, and that the Plaintiff's father had bought with notice of the agreement of the 15th of August, 1814, and continued:—]

I consider then that the title is sufficiently deduced, and I may add that if on any point, in going through a title like this, a defect should be found, I should certainly not allow the case to go off on that ground without first, if necessary, directing an inquiry to

(1) 2 Ph. 774.
(2) 1 D. F. & J. 33.
(3) 11 C. B. (N.S.) 455.
(4) 6 Ex. 630.
(5) 2 Mood. & Rob. 409.
(6) 11 A. & E. 695.
(7) 11 Ex. 855.

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supply the defect. We have arrived so far as this, that the Defendant is entitled to the benefit of this engagement, and the Plaintiff is bound by it, if it amounts to anything. Then we come to consider what is the evidence as to the actual payment of the rent; and as to that I do not look at the question with reference to or as having any bearing upon the construction of the 3rd section of the Act of Parliament, but solely for the purpose of considering whether there does or does not exist, by reason of the fact of the payment of the rent, any existing right founded on contract under the document of the 15th of August, 1814, *i.e.*, for the purpose of rebutting or meeting any case which might be set up on the footing of a supposed release or abandonment, or otherwise by way of bar under the statute, or on any such ground. I consider that the evidence is clear that the rent was paid up to 1854, and upon the whole evidence I hold that it was paid up to 1859, if that difference is important.

Then it remains to consider the construction of the document itself. It is contended that the true meaning of it is that it gives a right to *Henry Spencer*, his heirs and assigns, to require the windows to be blocked up, but that such right is only to exist and continue during the life of *Isaac Kirkbride*, and is not a right for ever. It is to be observed, however, that the document says in terms, "*Henry Spencer*, his heirs and assigns," so that the benefit of the agreement is to last for ever, unless it be limited by the fact that the obligation was intended to be temporary, or, as it was said in the argument, "personal," *i.e.*, to endure only during the life of *Kirkbride*. I do not, however, see how such a construction as that can be arrived at. In the first place, it is not said in the agreement that the right is to exist only during *Kirkbride's* life; secondly, it does not appear in terms what was to become of the obligation if *Kirkbride* conveyed the estate away. Would it in that case still continue as against his alienee? I think that the true construction is that the engagement entered into was to last until it in fact came to an end by the request being made and acted upon. It appears to me that it is not limited as to duration of time; it has reference to the mode of enjoyment of the properties, and of necessity the obligation must continue as long as the two properties were there, the lights on the one hand and the means of

obstruction on the other; and it might be brought to an end by a refusal to pay rent, by a refusal to perform the obligation, by the loss of the right to sue at law upon the agreement as a legal obligation, or by the loss of remedy in equity by reason of the non-enforcement of the right. As regards the agreement being objectionable on the ground of perpetuity, that argument has been urged over and over again as to all these obligations as to land, but it has never prevailed. Now suppose this case: suppose that a man sells a plot of ground to another, taking from him a covenant that if he builds and puts out windows looking over the adjoining land of the vendor, he will, upon the request of the vendor or his heirs and assigns at any time made, block up the windows; and we will suppose, in order to complete the transaction, that the conveyance is so made, and that that is all that is said; or we may suppose that the obligation instead of being inserted in the conveyance was contained in a separate contemporaneous document, that that contemporaneous document was not in fact signed by the vendor. It is said that in that state of things, although the terms of the contract or covenant were (as I am assuming) perfectly plain and clear that the act was to be done at any time upon request, yet that agreement (which expressly provided for an act to be done at any time) comes to an end at the end of twenty years by reason of the words of this Act of Parliament. Now, referring to the Act of Parliament, what is required in this 3rd section, as in two others, is that it shall appear that the enjoyment of the light was by some "consent or agreement expressly made or given for that purpose by deed or writing." It is contended that the true construction is that this "consent or agreement" must be by deed or writing signed by the person who is giving the license, or the leave to do the thing. Those words are, however, not in any one of the clauses of the Act. The section in question is not a very accurately framed or well-worded clause, but I will not be the first to hold that a signature such as this is not sufficient to bring the case within the exception contained in this section. It would be a strange thing indeed to say that a document signed by the person giving the license will be sufficient to shew that the licensee is holding under it, but that a document signed by the person getting the

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license, who says in it that he holds by license and agrees to do certain acts, shall not be sufficient. Either the case of the person who so gets permission was left out of the Act as being one which necessarily provided for itself without statutory enactment, or this is such a license or agreement as is within the terms of the statute. Even if it could be said that the case is within the *Prescription Act*, I should be prepared to hold that where (as in this case) the parties have been going on upon the faith of the agreement until a period within twenty years, there is a contract of which the benefit may be claimed against the person who contracted, and that (even if there were a bar under the Act of Parliament) there was nothing upon which to found a presumption of release or abandonment by lapse of time or otherwise. It is not, however, necessary to consider whether the contract is one which would have been actually enforceable. I have merely to say whether these Plaintiffs, coming here to enforce something, are to be allowed to do so in violation of their own contract, and inconsistently with something which under the terms of it they might be required to do. It appears to me that the Plaintiff's case is not well founded, and I dismiss the action with costs.

C. A. The Plaintiff appealed. The appeal came on to be heard on the 2nd of December.

Karslake, Q.C., and *T. A. Roberts*, for the Appellant:—

We contend that the memorandum in this case does not satisfy the terms of the statute. The consent must be given in writing by the person who consents, and an acknowledgment by the grantee that he does not hold as of right does not satisfy the condition. The difference of wording between this clause and the *Statute of Limitations* (3 & 4 Will. 4, c. 27), s. 14, shews that something different from a written acknowledgment was intended. An acknowledgment by payment does not exclude the operation of the statute: *Corporation of London* v. *Pewterers' Company* (1), *Plasterers' Company* v. *Parish Clerks' Company* (2); and there is no reason why a mere acknowledgment in writing should have a

(1) 2 Mood. & Rob. 409. (2) 6 Ex. 630.

greater effect. The agreement must not be an agreement signed only by the owner of the windows: *In re Lewis* (1).

Moreover, supposing this to be a license by *Spencer*, it is a license to *Kirkbride* only, and determines with his death: *Howes* v. *Ball* (2). There is no evidence that the rent has been paid within twenty years. Parol evidence as to the payment of sixpence in 1859 is untrustworthy, and the verbal statement of *Fowler* as to what it was paid for is not admissible. There has then been twenty years' enjoyment of light without any payment, and the agreement cannot be enforced.

Kekewich, Q.C., and *Ingle Joyce*, *contrà*, were asked to address themselves first to evidence of payment of rent in 1859:—

An entry against interest is admissible as evidence of everything contained in it that is immediately connected with the transaction, and there is no difference in principle between verbal statements and statements in writing: see the cases in note to *Barker* v. *Ray* (3). Time therefore has not run, the payment of rent within twenty years being proved, and the agreement to block up can be enforced on the principle of *Tulk* v. *Moxhay* (4).

[JAMES, L.J.:—Suppose there had been no rent, but a simple agreement to block up when required, could that be enforced at any time?]

We contend that it could, though we admit that there might be difficulty in saying that it could where a rent has been reserved and not paid for twenty years, as that would be evidence of abandonment of the bargain.

Roberts, in reply.

JAMES, L.J.:—

I am of opinion that the decree of the Vice-Chancellor in this case ought to be affirmed. I am satisfied on the evidence that the sum of sixpence was paid down to and including the year 1859, which was only eighteen years before the bringing of the action, or before the obstruction that was made by the Defendant.

(1) 1 Q. B. D. 724.
(2) 7 B. & C. 481.
(3) 2 Russ. 67.
(4) 2 Ph. 774.

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Then there are two questions, both of which were disposed of by the Vice-Chancellor, one under the statute and one wholly irrespective of the statute. Now, under the statute, if it is necessary to determine the case upon that, I am of opinion that this agreement is an agreement such as is required by the Act. It is certainly a sufficient agreement within the *Statute of Frauds*, for it is an agreement in writing signed by the party to be charged therewith. By it *Isaac Kirkbride* declares that the windows are put out and remain on the leave and indulgence of *Spencer*, and that he, *Kirkbride*, will, on the request of *Spencer*, or his heirs or assigns, wall and block up the same. That is the agreement under which *Kirkbride* holds the windows. He does not hold them merely by paying an acknowledgment, but he holds them under an agreement that he will when called upon block them up.

Now I find nothing in the Act of Parliament to say that the agreement there referred to must be signed by both parties, or that anything which would be a sufficient agreement under the *Statute of Frauds* would not be a sufficient agreement for the purpose of the later statute. The object of requiring an agreement in writing was, as I take it, the same as that of the *Statute of Frauds*, viz., not to allow the matter to depend upon parol evidence. To prevent this the thing must be sufficiently evidenced by a document in writing amounting to an agreement or consent. In my opinion there is an agreement in writing sufficiently evidenced by the signature of the person who obtained the lights upon an undertaking to block up the windows when called upon, and to pay 6*d.* a year for the use of them. That being so, it would be a very narrow construction of the statute, and altogether inconsistent with its meaning and principle, if we were to hold that this was not a sufficient agreement to prevent the acquisition of an indefeasible easement.

But, independently of that, I am of opinion that there is a distinct equity in this case which is not at all excluded by the provision of the statute about lights. There is nothing in the statute that prevents a man from making a bargain with regard to windows any more than it prevents him from making a bargain with regard to chimneys or doors or sewers. If there had been an agreement simply to this effect, "I do hereby declare that those

windows and lights are put out and remain on the leave and indulgence of the said *Henry Spencer*, and that I will at the request of the said *Henry Spencer*, or his heirs or assigns, shut or block up the same," there is nothing in the statute to prevent that from being a perfectly valid agreement binding in equity on the then owner of the estate and upon all persons who took the ownership of that estate with notice. A purchaser for value without notice would not be bound by it, but a volunteer or purchaser with notice is bound by it in exactly the same way as the original party was bound. Suppose that such an agreement had continued for fifty years, and both parties were still living, it would be impossible for *Isaac Kirkbride* at the end of the fifty years to say, "I have had these windows for fifty years, and have never during that period said anything about them or paid anything for them. I am, therefore, absolutely entitled to the use of them." The reply would be, "You have enjoyed the windows under that agreement. I have continued my permission to you, and you were always under the equitable obligation to block them up when called upon to do so." In this case the call has been made upon the owner of the estate to block up the windows, and after calling upon him to block them up an obstruction of the light is no breach of that agreement. Suppose a man said, "Will you allow me to make a sewer through your field; you do not want it for any purpose with which the sewer will interfere." The other party says, "I will allow you to make the sewer if you give me an undertaking to block it up or divert it when required." As long as there is no conveyance to a purchaser for valuable consideration such an agreement in equity affects the land in the hands of one party for the benefit of the other. In this case I am of opinion that there never has been a time at which the agreement to block up was not in force. Of course where, as in this case, there is not only an agreement to block up the windows when required, but an agreement to pay 6*d.* a year, then if for more than twenty years the 6*d.* is not paid that would be evidence that from some cause or other the bargain was put an end to, or that the parties were at arms' length for more than twenty years, and would be an answer to any application to the Court to enforce the agreement.

I am of opinion that here the payment within the twenty years

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is proved, and that there is no ground whatever for inferring that the lights were not always enjoyed by the owner of the house under and by virtue of the agreement so entered into. A claim was made by *Spencer's* successors in title to have the windows blocked up, and that is a sufficient answer to the claim of the adjoining owner to prevent the access of light being obstructed by the Defendant.

BAGGALLAY, L.J.:—

I am of the same opinion.

The first point raised by the Appellant was that the memorandum of the 15th of August, 1814, was not a consent or agreement expressly made or given by deed or writing within the meaning of the 3rd section of the *Prescription Act*. I am unable to agree with that view. The contention of the Appellant is that the memorandum, in order to bring it within the meaning of that section, should have been signed by both the parties to it, or at least by the party giving the consent to the opening of the windows. There is nothing whatever in the statute leading to that inference. It might be that the enjoyment was by virtue only of consent given by the one party, and in such a case the consent might possibly be required to be signed by the party giving it; but the enjoyment may be by virtue of an agreement, and the agreement may be an agreement by the party who receives the benefit to do a certain thing in consideration of a license being granted to him. In that case it probably would be held essential that the agreement should be signed by the party so sought to be bound. Here it is quite clear that the enjoyment was an enjoyment by reason of the agreement on the part of *Kirkbride* that the windows should be closed whenever they were required to be closed. I leave out the further consideration of the payment of 6*d.* per year in the meantime, but the agreement by virtue of which he had the enjoyment was an agreement that he would close the windows when required. That agreement was in writing and was signed by him.

The next question is whether any payment was made in the year 1859. I agree with the Lord Justice and with the Vice-Chancellor that the payment of 6*d.* did take place in the year 1859. If so there is a payment not more than eighteen years before the

commencement of the present action. It is quite true that in the case of the *Plasterers' Company* v. *Parish Clerks' Company* (1) it was held that the payment of a rent by virtue of an agreement was not an interruption within the meaning of the 3rd section, and Lord *Campbell* in that case said, "You must read the 3rd and 4th sections together, and looking at the two sections together I think there must be an actual discontinuance of the enjoyment by reason of the obstruction which is submitted to or acquiesced in for a year." But although the payment of the rent may not be an interruption to bring the case within the earlier part of the section, it is a clear recognition of the continued existence of the agreement under which the enjoyment is had. If that agreement was only a parol agreement it carries the case no further, but if the agreement is in writing, then, by virtue of the payment, you have very strong evidence indeed, and to my mind conclusive evidence, that the agreement was in force down to a period not exceeding eighteen years from the commencement of this action. That appears to me to be sufficient to decide the case; but by deciding the case on this ground I desire it to be understood that I do not express dissent from the view expressed by the Vice-Chancellor, which might be sufficient to justify the dismissal of the bill, even if there had been a failure to prove the payment of the 6*d.* in the year 1859. So far from dissenting from that view of the case as at present advised, and having regard to the decision in *Tulk* v. *Moxhay* (2), and in other cases which have followed it and illustrated the principles enunciated in that case, I am disposed to think the view of the Vice-Chancellor was quite correct, and that the bill was properly dismissed on those grounds alone.

THESIGER, L.J.:—

I agree that the judgment of the Vice-Chancellor was right and should be affirmed, and upon these grounds: first, that as a matter of fact the enjoyment of the windows, which is the subject of dispute between the parties, has been continuously an enjoyment under the agreement of 1814; and, secondly, that that agreement is an agreement within the terms of sect. 3 of the *Prescription Act.*

(1) 6 Ex. 630. (2) 2 Ph. 774.

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As regards the facts, there can be no doubt that in the year 1814 the enjoyment of these windows was held by *Kirkbride*, the then owner of the premises upon which these windows were situate, under an agreement with the owner of the adjoining property; and I think it is equally clear that, at all events for a considerable time, the enjoyment continued to be under that agreement. But notwithstanding that if the enjoyment had for some time been clearly under the agreement, and had been shewn to be so by the payment of the annual sum of 6*d.*, it had been proved that the payment of that sum had been discontinued, and that the enjoyment of these windows had continued either as between the original parties to the agreement or as between their successors in title, without any further payment and without any further communication between the parties or the successors in title for a period of over twenty years, I think that under such circumstances we might and ought to have inferred that the agreement had been put an end to, and that the enjoyment was an enjoyment, under such circumstances, as would constitute an indefeasible right to these windows under the statute. It therefore becomes important to see whether the payment of the 6*d.* did continue to within the period of twenty years before action brought. Now there is clear evidence of payment of this annual sum down to the year 1854; but that is not sufficient, and therefore it is that the Defendant endeavours to prove that there was also a payment in 1859, and I am of opinion that he has succeeded in proving it. The evidence is of this kind: For some time before 1854 there appears to have been a collection of this sum of 6*d.* by a man of the name of *Fowler*, and his agency down to that date is clearly proved. There is also proof that in the year 1859 that same man paid this same sum to his principal, and at the time made a declaration, from which I should clearly infer that the payment of the sum was a payment of the sum reserved by the agreement of 1814. But two objections are made as to the admissibility or the effect of this evidence; first, that there is no evidence of the agency of *Fowler*, and, secondly, that the declarations of *Fowler* would not be admissible even if the agency were proved. I think that neither of these objections is sustainable. In the first place,

as regards the agency, and in the absence of any evidence to the contrary, the proper presumption from the fact of his being agent down to a certain period is that he continued agent at the later period, and as regards the declarations of that agent, although verbal, I am of opinion that they are clearly admissible as much as entries which he might have made relating to the same circumstances in a book. The principle upon which statements of a deceased person are admissible in evidence is this, that in the interests of justice, where a person who might have proved important material facts in an action is dead, his statements before death (I pass over for the moment whether in writing or verbal) relating to that fact are admissible, provided there is a sufficient guarantee that the statements made by him may be taken to be true. It is considered, and properly considered, that where the statements made by a person were statements against his interest, those statements, at all events in the general run of cases, would be true.

Now, is there any reason in principle why there should be a distinction made between the written entries of a deceased person under such circumstances and his verbal declarations? I can see no reason. Where the statements are merely verbal there is reason for watching more carefully the evidence by which those declarations are proved, but, provided you are satisfied that the declarations were in fact made, there is no reason whatever why there should be any distinction between the admissibility of the verbal declarations and the admissibility of the written entries. As regards the admissibility of evidence in matters of pedigree, there has never been any distinction drawn between written entries, for instance, entries in a family Bible, and the verbal declarations of a deceased relation. And more than that, apart from the question of principle, I think it has been decided upon more than one occasion, that the suggested distinction does not exist in the case of declarations against interest, any more than it exists in cases of declarations relating to pedigree. I find upon reference to the note in *Higham* v. *Ridgway*, in the second volume of *Smith's* Leading Cases, that no less than three cases are cited in which verbal declarations against interest have been received,

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viz., *Ivat* v. *Finch* (1); *Doe* v. *Marjoribanks* (2); *Reg.* v. *Guardians of Exeter* (3). I am of opinion, then, that *Fowler* is shewn to have been agent and that his declarations were admissible, and his declarations, if admissible, prove conclusively to my mind, in the absence of any contradictory evidence, that he did in the year 1859 receive from the then owner of those windows a payment of 6*d.* under the agreement of 1814, which shewed that at that date, and therefore within the twenty years, there was an enjoyment of the windows solely under the agreement.

The only remaining question is as to the construction of the 3rd section of the Act. It is said that the section contemplates, not an agreement in the popular sense of the term, so as to be satisfied by shewing that the person sought to be charged with the agreement has signed the document in writing which is said to constitute the agreement, but an agreement in writing in a stricter and more technical sense, which would require that each of the parties should put his signature to the document. I cannot agree with that latter view. In the first place, if the whole of the section is looked at, it would appear that the terms used are not used in an artificial or technical sense. That is especially shewn to my mind by the latter words of the section, "Unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." Separate the two things and we find that either a consent may be given or an agreement may be made. I think it could hardly be disputed that although in the strict technical etymology of the word, "consent," as well as "agreement," implies two parties, yet "consent," used in the ordinary way in which that term is used, is satisfied when it is found that one person has given what is popularly known as consent. I cannot entertain any doubt that if in this case there had appeared a writing signed by the owner of the premises against whom this right to lights is claimed, shewing that he was consenting to these lights being enjoyed, not as a matter of right, but as a matter of leave and license, that consent would have been sufficient within the statute, although the writing was not signed by the owner of the windows. If that be so, we are

(1) 1 Taunt. 142. (2) Gowl. 227.
(3) Law Rep. 4 Q. B. 341.

brought a considerable step on the way towards holding that the converse would hold with reference to an agreement. I cannot doubt that where in distinct terms the owner of the windows has put his hand to a writing by which, in the ordinary and popular sense of the terms, he has agreed that he would enjoy those windows solely as a matter of indulgence and not of right, he has made to all intents and purposes such an agreement in writing as is contemplated by the statute.

Then is there any decided case which militates against this view? The only case cited which could be held in any way to do so is a case which Mr. *Roberts* very properly cited of *In re Lewis* (1). That was a case arising under the *Attorney and Solicitors Act*, the question being whether there was a sufficient agreement by a client to pay a certain sum for costs to his solicitor. The terms of the Act required an agreement in writing before any client could be charged, and obviously, looking at it from a lay point of view, as well as from a legal point of view, the person who at all events must sign the agreement would be the party to be charged under that agreement, viz., the client, and there the client had not signed, but the attorney was attempting to enforce the agreement under a signature by himself alone. There could not be a doubt that under such circumstances that agreement could not be enforced against the client, and although Lord *Coleridge* no doubt, in delivering the judgment of the Court, used expressions which were wider than were actually required for the purpose of deciding that case, I think those expressions must be limited to the facts of the case; and even if in the case of an agreement in writing under the *Solicitors Act* it were necessary that both parties should sign it, yet it would by no means follow that under the *Prescription Act*, where in point of fact only one of the parties has to do anything, viz., either the one party to give a consent, or the other party to agree that he holds only as a matter of indulgence, a signature by both parties would be required. For these reasons I think the appeal must be dismissed.

JAMES, L.J.:—

I desire to add with reference to the question as to this being

(1) 1 Q. B. D. 724.

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an agreement enforceable in equity, that an agreement with regard to the windows of a house for valuable consideration is as much enforceable in equity in the same way, within the same time, against the same persons, under the same conditions, and under the same circumstances of limitation as any other agreement with respect to any other part of a house, or any other real property.

Kekewich applied that the costs of the shorthand notes of the cross-examination in the Court below, which had been used on the appeal, might be allowed.

JAMES, L.J.:—

As these notes were not taken for the purpose of the appeal the costs cannot be treated as part of the costs of the appeal.

Solicitors: *Helder, Roberts, & Gillett; Gregory, Rowcliffes, & Rawle.*

C. A. 1879 Dec. 4.

Ex parte EARLY. *In re* GOLDING.

Liquidation Petition—Registration of Resolutions—Statement of Affairs—Small Amount of Assets—Bona fides of Creditors—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Rules*, 1870, *rr.* 295, 301.

16 Ch D 655 6567-8-9 660 18 Ch D 496

Registration of the resolutions passed by the creditors under a liquidation petition having been refused, leave was given to the debtor, a trader, to summon a fresh first meeting of the creditors. The fresh meeting was held more than two months after the original meeting, but the debtor produced the same statement of his affairs as he had produced at the original meeting:—

Held, that, there being no evidence that the state of the debtor's affairs had changed in the interval, it could not be taken that the statement was necessarily inaccurate.

The creditors of a debtor, whose statement of affairs shewed that his debts amounted to £534 and his assets to £85, resolved on a liquidation by arrangement, and gave the debtor an immediate discharge. The registration was opposed by one creditor, who had, after the filing of the petition, seized the whole of the debtor's goods under a *fi. fa.*:—

Held, that the resolutions could not be treated as any abuse of the procedure of the Court, or as having been passed *malâ fide*.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

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Ex parte EARLY. *In re* GOLDING.

Thesiger, L.J.

On the 25th of July, 1879, *James Golding*, a poultry dealer, filed a liquidation petition. The first meeting of the creditors was held on the 11th of August.

The statement of affairs then produced by the debtor shewed that his liabilities amounted to £534 and his assets to £85. There were only five creditors mentioned in the statement. One of them was named *John Armineer*, his debt being stated as £285. Another was Mr. *T. W. Baldwin*, the debtor's solicitor. A third was *E. C. Early*, who had issued execution on a judgment debt for £95 after the filing of the petition. On the 1st of August an injunction had been granted, restraining him until the 15th of August from proceeding with his execution. The creditors at the first meeting resolved to accept a composition of 1*s.* in the pound. The second meeting was held on the 20th of August, when resolutions were passed in favour of a liquidation by arrangement. The registration of these resolutions was however refused by the Registrar, on the ground that the meeting had been dissolved by the chairman without *Early* being allowed to prove. Leave was, however, given to summon a fresh first meeting.

This meeting was summoned for the 24th of September, and it was on that day adjourned to the 8th of October. At the adjourned meeting no one attended, in consequence of *Early's* having subpœnaed the other creditors as witnesses in some criminal proceedings which he had instituted against the debtor. Leave was again given to summon another fresh first meeting. This meeting was held on the 29th of October, when the creditors resolved on a liquidation by arrangement, and granted the debtor an immediate discharge. The debtor at this meeting produced the same statement of affairs as he had produced at the original meeting on the 11th of August. The injunction against *Early* had been continued from time to time, but was ultimately allowed to drop. The sheriff then sold the debtor's goods, which formed the whole of his assets, for £85. The expenses reduced this sum to £54. *Early* did not assent to the resolutions, and opposed their registration on two grounds;—1, that no proper statement of the debtor's affairs had been submitted to the meeting; 2, that the debtor had practically no assets, and that in passing the resolutions the persons alleged to be creditors were acting solely for the benefit of the debtor.

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The debtor, in answer to questions put to him at the meeting by *Early's* solicitor, said that he and *Armineer* were like brothers, and that he had borrowed money from him and lent him money for years without keeping any account whatever of the transactions.

The Registrar ordered the resolutions to be registered.

Early appealed.

Northmore Lawrence, for the Appellant:—

The statement of affairs produced in August could not be an accurate statement of the debtor's affairs in October; it is *ex facie* an insufficient statement, and therefore rule 301 of the Bankruptcy Rules, 1870, does not apply, and the passing of the resolutions is not conclusive that the provisions of the statute have been complied with: *Ex parte Walter* (1).

Moreover, having regard to the small amount of the assets compared with the amount of the liabilities, and to the friendly relations which are shewn to exist between the debtor and the principal creditor, it is clear that the resolutions must have been passed in the interest of the debtor, not in that of the creditors, and that they are an abuse of the procedure of the Court: *Ex parte Staff* (2); *Ex parte Russell* (3); *Ex parte Aaronson* (4); *Ex parte Hope* (5).

F. Cooper Willis, for the debtor:—

In *Ex parte Aaronson* and in *Ex parte Staff* the proportion of assets to liabilities was much smaller than in the present case. Indeed in *Ex parte Aaronson* there were practically no assets at all. In the present case, but for the conduct of the Appellant, there would have been £85 to divide among the creditors, and that would have given a very good composition. He is the only person who opposes the registration, and it is plain that his object is to get all the assets for himself. The question whether the petition is an abuse of the procedure ought to be determined at the date of the filing of the petition, not at the date of the appli-

(1) 2 Ch. D. 326.
(2) Law Rep. 20 Eq. 775.
(3) Law Rep. 10 Ch. 255.
(4) 7 Ch. D. 713.
(5) 9 Ch. D. 398.

cation to register the resolutions. The question is whether the debtor was entitled to file the petition.

[He was stopped by the Court.]

Northmore Lawrence, in reply:—

The Appellant was entitled to issue his execution when he did so. The question is whether the statement of affairs produced at the last meeting was a sufficient one.

JAMES, L.J.:—

I am of opinion that we cannot differ from the Registrar's decision. No doubt the assets are very small, and probably they will produce nothing for any one. But the real contest has been whether one creditor shall take the whole of the assets, or whether they shall be distributed among all the creditors. The debtor may well have honestly thought that his assets should be distributed equally, and the other creditors may have honestly thought that they should have a share. It is impossible to say that the proceedings shew on their face that there has been any abuse of the procedure of the Court, or any fraudulent use of the power of the majority of the creditors. The statement of the debtor's affairs seems to me an honest one. There is no evidence that there was any change in the state of his affairs between August and October. It would have been the easiest thing in the world for the Appellant to have asked the debtor at the meeting whether there had been any such change. The appeal must be dismissed with costs.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitors for Appellant: *Harper, Broad, & Battcock.*
Solicitor for Debtor: *T. W. Baldwin.*

C. A. 1879 Dec. 4.

Ex parte BAGSHAW. *In re* KER.

Secured Creditor—Proof—Forfeiture of Security—Mistake—Rectification of Proof—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 16, 40—*Bankruptcy Rules*, 1870, *rr.* 99, 100, 136, 272.

19 C.L.D. 403.

Semble, that a secured creditor, who by mistake has omitted from his proof of debt a part of his security, will not necessarily be held to have forfeited that part, but may be allowed to rectify his proof.

Observations on *Ex parte Ashworth* (1) and *Ex parte King* (2).

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

On the 6th of June, 1878, *J. C. Ker*, a commission agent, filed a liquidation petition, and on the 27th of June the creditors resolved on a liquidation by arrangement, and appointed *Edward Hart* trustee.

W. E. Bagshaw held a mortgage of a leasehold house called *The Cedars*, at *Streatham*, belonging to the debtor, to secure £4000 and interest. Early in June, 1878, he, in exercise of a power of sale contained in the mortgage, caused *The Cedars* to be advertised for sale by auction on the 26th of June. The particulars of sale stated that "the blinds, gas fittings, chandeliers and pipes, and other effects, according to an inventory to be produced at the time of sale, are to be taken at a valuation in the usual way." On the 18th of June, the solicitors of *Hart*, who was at the time acting as receiver under the petition, wrote to *Bagshaw's* solicitors, saying that the blinds and other articles, mentioned in the particulars of sale as to be taken by the purchaser at a valuation, were not included in the mortgage, and were part of *Ker's* estate.

Bagshaw's solicitors replied that it was not their intention to include the fittings in the sale of the property, and that they had instructed the auctioneers to that effect. They added, "We will again draw their attention to the matter, and arrange for their withdrawal at the auction." At the auction, on the 26th of June, the auctioneer stated that he had no power to sell the fixtures, and withdrew them from the sale. The property was knocked down

(1) Law Rep. 18 Eq. 705. (2) Law Rep. 20 Eq. 273.

to a Mr. *King* for £3000. At the meeting of the creditors on the 27th of June, *Bagshaw* proved for £4385 due to him on the mortgage, stating in his affidavit of proof that he had no security for the debt, except the property comprised in the mortgage, which had been sold the previous day for £3000, and he voted in respect of £1385, the balance of his debt above £3000. The fixtures and other fittings in *The Cedars* were afterwards sold by *Hart* to *King* for £220, and *Bagshaw* claimed the £220, on the ground that it represented property which was included in his mortgage, and he applied to the Court for an order that the trustee should pay the £220 to him. The Registrar refused the application.

Bagshaw appealed.

Finlay Knight, for the Appellant:—

The fixtures were comprised in the mortgage, and the Appellant has not waived his right to them.

E. Cooper Willis, for the trustee:—

The fixtures were withdrawn unconditionally from the sale, and the Appellant has abandoned whatever right he may have had to them. By the form of his proof, and by voting in respect of his whole debt, less the sum provided by the sale of the house, he has forfeited any other security which he may have had: *Ex parte Ashworth* (1); *Ex parte King* (2); *Bankruptcy Act*, 1869, ss. 16, 40; Bankruptcy Rules, 1870, rr. 99, 100, 136, 272. Many of the articles claimed as fixtures are simply chattels.

Finlay Knight, in reply:—

The circumstances under which the proof was made must be taken into consideration; it is plain that there was no deliberate intention of abandoning the fixtures. The remarks of Lord Justice *James* in *Ex parte Wood* (3) shew that *Ex parte Ashworth* and *Ex parte King* cannot be considered as binding authorities.

JAMES, L.J.:—

It appears to me that we cannot differ from the conclusion of

(1) Law Rep. 18 Eq. 705. (2) Law Rep. 20 Eq. 273.
(3) 10 Ch. D. 554, 557.

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the Registrar. I think that the fixtures were unconditionally withdrawn from the sale, and the proof was deliberately made on the footing that the £3000, which the house had realized at the sale, was all that the Appellant had got as security. He proved his debt and voted in respect of it on that footing. I do not say that *Ex parte Ashworth* (1) and *Ex parte King* (2) may not require further consideration, if the question should arise whether there is any positive rule that, if a mortgagee has made a mistake in his proof, he is not entitled to have it rectified on making a proper application. But in the present case I am not satisfied that the Appellant has made out any case for having his proof remodelled, especially having regard to the fact that, as appears by the inventory of the articles claimed, the value of the fixtures is very much less than £220. Some of the articles clearly could not be considered as fixtures at all. I do not think we ought to interfere.

BAGGALLAY, L.J.:—

I am of the same opinion. I am by no means disposed to say that in no case ought a mortgagee to be allowed to remodel his proof. On the contrary, as at present advised, I think he ought to be allowed to do so in a proper case and on proper terms. But that should only be on the ground of his having acted under a mistake throughout. In the present case I am by no means satisfied that it was not the original intention of the mortgagee (it may be that he was ignorant of his rights) to give up his security on the fixtures. At the same time the fixtures were of very trifling value, and, taking all the circumstances into consideration, I think we ought not to interfere.

THESIGER, L.J.:—

I am of the same opinion. If I had seen clearly that the mortgagee had made a mistake in his proof, and had undesignedly shut himself out from a part of his security, I should have been disposed to help him. I should have thought the case could be distinguished from *Ex parte Ashworth* and *Ex parte King*, even assuming that those cases are not open to reconsideration. But here, looking at the fact that a great many of the things which

(1) Law Rep. 18 Eq. 705. (2) Law Rep. 20 Eq. 273.

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are claimed are not properly fixtures, I cannot help thinking that the mortgagee intended to give up his claim altogether, and indeed the evidence tends to shew that that was his intention. After the claim was made by the receiver the articles in question were unconditionally withdrawn from the sale, and the proof was immediately afterwards made which stated £3000 as the amount of the security without any reservation.

Solicitors for Appellant: *Clarke & Calkin.*
Solicitors for Trustee: *Arkcoll, Jones, & Cockell.*

In re FAIRCLOTH (A SUPPOSED LUNATIC).

C. A. 1879 *Nov.* 15, 29; *Dec.* 6.

Lunacy—Summary Jurisdiction Clauses—25 & 26 Vict. c. 86, ss. 12, 13.

In ascertaining whether the property of a person of unsound mind is of the amount of £1000 or less, so as to bring the case within 25 & 26 Vict. c. 86, s. 12, his debts and the expenses incurred in his past maintenance since he became of unsound mind are to be deducted.

THIS was a petition for an order rendering the property of Mrs. *Faircloth*, who had become of unsound mind, available for her maintenance under the summary jurisdiction conferred by the *Lunacy Regulation Act*, 1862 (25 & 26 Vict. c. 86), ss. 12, 13, in cases where the property does not amount to £1000.

Mrs. *Faircloth* was a widow of the age of about seventy-seven, and became of unsound mind in June, 1878. Her property was as follows:—

Railway stock and Russian bonds valued at	£875	7	6
Annuity of £20 for her life valued at . .	70	0	0
	£945	7	6

She was also entitled to arrears of income, which had accrued since she became of unsound mind, to the amount of £95 7*s.* 7*d*, thus making the total of her property £1040 15*s.* 1*d.*

The Petitioner was the son and only child of Mrs. *Faircloth.* When she became of unsound mind she was at first very violent, and he placed her at a lunatic asylum, where she remained to the

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22nd of August, 1879, at which date the Petitioner removed her to his own house, where she had since resided. At the time of the first attack she had some cash in her possession. The Petitioner expended this cash and also £28 14*s.* 4*d.* of his own money in paying the charges at the lunatic asylum. He engaged a nurse to attend upon her, and he claimed to be allowed the following sums:—

Paid at asylum	£28	14	4
Board and lodging of the lunatic and nurse from 22nd of August to 21st of November	42	5	0
Wages of nurse	2	18	4
Expenses of valuing the lunatic's property .	1	11	6
Debt due from the lunatic before her lunacy .	3	11	6
	£79	0	8

The petition asked in substance that the arrears of income, after the payment of the costs of the petition, might be paid to the Petitioner; that he might retain out of them what he claimed to be due to him, he undertaking to apply the surplus, if any, for the benefit of the lunatic; and that the future income might be paid to him for her maintenance.

1879. Nov. 15, 29. *J. D. Davenport,* for the Petitioner:—

I submit that the case comes within the 12th and 13th sections of the Act, for that both debts of the lunatic and expenses which have been properly incurred on her behalf ought to be deducted in ascertaining the value of her property, and if this be done the value of the property is less than £1000: *In re Adams* (1).

1879. Dec. 6. BAGGALLAY, L.J.:—

The only authority referred to on the question whether the debts of the lunatic and the expenses of her past maintenance can be deducted in ascertaining the amount of her property is *In re Adams,* before Lord *Westbury.* The facts of that case can only be come at by comparing the different reports. Lord

(1) 4 D. J. & S. 182; 9 L. T. (N.S.) 626; 3 N. R. 339; 10 Jur. (N.S.) 137; 12 W. R. 291.

Westbury laid it down that the word "property" in the Act must be taken to mean beneficial property clear of debts. The report in 4 D. J. & S. does not state the nature of the debts, and on referring to the *Weekly Reporter* I find it stated that they were debts of ancestors of the person of unsound mind. From the report in the *Law Times*, however, it appears that the property of the lunatic consisted of a moiety of a real estate subject to a mortgage, the net income of his share of which, after payment of interest on the mortgage debt, was £43 14*s.* 1*d.*, and of real estate derived from his father of the value of £820, subject to so much of the father's debts, amounting to £891, as the father's personal estate, amounting to £350, was insufficient to pay, leaving a surplus value of £289. In this state of circumstances the property must clearly have been of a value exceeding £1000, unless the claims against the lunatic's estate for past maintenance and simple contract debts, which are stated to have amounted to £330 15*s.* 7*d.*, were to be deducted. In the New Reports the statement of the property is somewhat different, but there, also, it appears that the property could only be brought below the limit by deducting the past maintenance. The case therefore is an authority for the position that in estimating the value of a lunatic's property for the purposes of the 12th section, his debts and the expenses of his past maintenance are to be deducted. This seems reasonable, for the object of the section was to provide a cheap way of applying the lunatic's property for his benefit when it was below a certain amount, and there is just as much reason for such a jurisdiction where the balance, after making these deductions, is below £1000 as where the whole property is below that amount. The order will therefore be made as prayed.

JAMES and THESIGER, L.JJ., concurred.

Solicitors: *Cooper & Walker.*

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NEWBIGGIN-BY-THE-SEA GAS COMPANY *v.* ARMSTRONG.

[1878 N. 81.]

Practice—Action brought by Solicitor without Authority—Judicature Act, 1875, *s.* 21—*Costs—Practice in Cases where no Rule laid down by New Orders.*

Post 764
16 Ch D 727
17 Ch D 210
18 Ch D 454
20 Ch D 674

Where a solicitor has commenced an action in the name of a Plaintiff without authority, the proper course is for the Plaintiff to serve notice of motion on the Defendant, as well as on the solicitor, that the action may be dismissed, and that the solicitor may pay the costs of the Plaintiff as between solicitor and client, and the costs of the Defendant as between party and party.

In cases where no rule of practice is laid down by the new Orders, and there is a variance in the old practice of the Chancery and Common Law Courts, that practice is to prevail which is considered by the Court most convenient.

IN this case an action was brought in the name of the company, the *Newbiggin-by-the-Sea Gas Company;* and the Plaintiffs complained that the name of the company had been used by the solicitor, Mr. *F. W. Jacomb*, without their authority.

A dispute had arisen in the governing body of the company and two sets of the directors had been appointed, each of which disputed the validity of the appointment of the other, and claimed the right to represent the company. Mr. *Jacomb* was instructed to issue the writ by one set of directors, and the other set, in the name of the company, moved before Mr. Justice *Fry* that the action might be dismissed and the solicitor ordered to pay the costs. The Defendant was not served with the notice of motion. Mr. Justice *Fry*, after hearing the evidence of the contending parties, came to the conclusion that Mr. *Jacomb* was not authorized to issue the writ in the name of the company, and made an order that the action should stand dismissed without prejudice to any application which the Defendant might make as to his costs; and that Mr. *Jacomb* should pay the costs of the Plaintiff company to be taxed between solicitor and client, including the costs of the application.

From this order Mr. *Jacomb* appealed.

Caldecott (*North*, Q.C., with him), for the Appellant, contended that the evidence shewed that the directors who instructed Mr. *Jacomb* were duly appointed, and were entitled to use the name of the company.

Cookson, Q.C., and *Bush*, for the company, were not called on.

JESSEL, M.R. :—

This is an appeal from an order of Mr. Justice *Fry*, on an application by the Plaintiff company that the action should be dismissed, and that the solicitor should pay the Plaintiffs' costs, on the ground of his not being properly authorized to represent the company.

The order follows the old practice of the Court of Chancery in such cases, by which the defendant was not served with notice of the application, but was left to get his costs from the person named as plaintiff, who had afterwards to get those costs over from the solicitor. The result was that the nominal plaintiff, who had never given any authority for the use of his name, had to pay the defendant's costs, and might be unable to recover them by reason of the insolvency of the solicitor. On the other hand, according to the practice of the Common Law Courts, the defendant was served with notice of the application, and the solicitor had to pay the costs of both the plaintiff and the defendant. That appears to me to be better practice. The question is which practice is now to be followed. Since the passing of the *Judicature Act* that must be left to the Court to determine. By the 21st section of the *Judicature Act*, 1875, it is enacted that in cases where no new method of procedure is prescribed the old practice is to prevail, but where there is a variance in the practice it does not say which practice. I have no hesitation in saying, as I have already said at the Rolls Court, though not with the same authority with which I now say it, that I think the Common Law practice in this case is founded in natural justice, and ought to be followed for the future.(1)

[His Lordship then considered the evidence in the case, and said that he agreed with Mr. Justice *Fry* that the appointment of

(1) See Russe v Dumford post. 760.

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NEWBIGGIN-BY-THE-SEA GAS COMPANY v. ARMSTRONG.

Mr. *Jacomb* as solicitor was invalid, and that although he had acted *bonâ fide*, he had done so at his own risk, and must pay the costs of the suit. The appeal must, therefore, be dismissed with costs.]

JAMES, L.J.:—

I entirely agree.

BRETT, L.J.:—

I am of the same opinion. I am very glad to hear the Master of the Rolls affirm what I have myself often said since the *Judicature Act* came into operation, that in matters of practice not provided for by the new Rules, that practice which upon consideration appears to be the best ought to prevail.

Cookson, Q.C., said that he was authorized to appear for the Defendant as well as for the company, and asked that an order might now be made for the payment of the Defendant's costs by Mr. *Jacomb*.

JESSEL, M.R.:—

That being so, the order can be set right at once by directing that the solicitor shall pay the costs of the Plaintiffs as between solicitor and client, and the costs of the Defendant as between party and party.

Solicitors: *Pattison, Wigg, & Co.*, agents for *R. Dickinson, Newcastle; Williamson, Hill, & Co.*

Ex parte DEAN. *In re* DEAN.

C. A. 1879 Dec. 18.

Liquidation Petition—Registration of Resolutions—General Meeting—Want of Notice to Creditors—Proof of Notice—Fresh Second Meeting—Discretion of Registrar—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 125, 126—*Bankruptcy Rules*, 1870, *rr.* 97, 98, 256, 282. 295.

Rules 97 and 98 of the Bankruptcy Rules, 1870, apply to bankruptcy only, and do not apply to liquidation by arrangement or composition.

The affidavit, made in accordance with rule 256, of the posting to creditors of notices of a general meeting under a liquidation petition, is only *primâ facie*, not conclusive, evidence that the creditors have received the notices.

The Registrar has a judicial discretion to require further evidence of the receipt of the notices, and, if satisfied that some of the creditors have not received notice, to direct the summoning of a fresh meeting, and the Court of Appeal will not interfere with the exercise of his discretion, unless very clearly satisfied that he has exercised it wrongly.

On the 3rd of June, 1879, *Thomas Dean*, a grocer at *Stoke Newington*, filed a liquidation petition. On the 23rd of June the first general meeting of the creditors was held, when it was resolved to accept a composition of 2*s.* in the pound. The resolutions fixed the 5th of July for the holding of the second general meeting. At the second meeting, held on that day, the resolutions passed at the first meeting were confirmed. The registration of the resolutions was opposed on behalf of four dissentient creditors, on the ground that they had not received the notices sent to them of the second meeting, in consequence of which they were unable to attend, and did not in fact attend that meeting. All the four creditors were present in person or by proxy at the first meeting. In support of the application there was evidence that neither of the four creditors had received a notice of the second meeting. The ordinary affidavit was made by one of the clerks in the Bankruptcy Court to the effect that he had posted a copy of the notice of the second meeting addressed to each and every of the creditors mentioned in a list annexed to his affidavit. This list included the four opposing creditors. Mr. Registrar *Murray*, acting as Chief Judge, made an order that "The Court being satisfied that the objecting creditors had not received the notices

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sent to them of the second meeting, and being of opinion that by reason thereof the proceedings had and resolutions come to at such meeting were invalid as against the creditors aforesaid, doth order and declare accordingly, and doth refuse to register such resolutions. But this Court doth further order that the debtor be at liberty forthwith to summon a new second general meeting of his creditors, in lieu of that held on the 5th of July, and that the Registrar of this Court do issue in the prescribed form the notices to convene such new second general meeting accordingly."

The debtor appealed.

De Gex, Q.C., and *Finlay Knight*, for the Appellant:—

The Respondents knew from the resolutions passed at the first meeting, at which they were present, when the second meeting was to be held. If they had been at the second meeting their votes would not have altered the majority. The notices were sent in the mode prescribed by rules 256, 282 of the Bankruptcy Rules, 1870 (1).

[They were stopped by the Court.]

E. Cooper Willis, for the opposing creditors:—

Rule 97 makes the affidavit of the posting of a notice evidence that it has been duly sent to the person to whom it was addressed,

(1) Rule 255: "The first general meeting of creditors shall be summoned by notice according to the form in the schedule."

Rule 256: "All first general meetings shall be summoned as follows:—

"A sufficient number of forms of such notice, duly signed, addressed, and stamped for post, shall be delivered to the Registrar, together with a request and list of creditors according to the form in the schedule, and such list may be added to, or additional requests and lists be filed, as circumstances may require. Every request shall bear a stamp, calculated at the rate of threepence for each notice required to be sent. The Registrar shall cause the notices to be checked with the list or lists delivered to him, and to be sealed with the seal of the Court, and to be posted to the creditors, and the person posting the same shall forthwith make and file an affidavit, exhibiting a form of notice, and stating that he had posted similar notices to the persons mentioned in the lists delivered to the Registrar, and stating also the date and place of posting."

Rule 282 provides that notice of the second general meeting "shall be given to every creditor in manner provided with respect to first general meetings, with this addition, that the notice to every creditor who was not present or represented at the first general meeting shall be sent by registered post letter."

and rule 98 provides that "the resolutions come to at a meeting shall be valid, notwithstanding that some creditors shall not have received the notice sent to them, unless otherwise ordered by the Court." In the present case the Court has otherwise ordered. The Registrar came to the conclusion that the opposing creditors had not received notice of the meeting, and he has only given leave to summon a fresh second meeting. He had a judicial discretion, which he has properly exercised, having all the facts before him.

De Gex, in reply:—

This Court can review the exercise of the Registrar's discretion. Rules 97, 98 apply only to bankruptcy. They do not apply to liquidation or composition, which are governed by the distinct code contained in rules 252–315. Rule 256 is that which governs the present case, and it has been exactly followed.

[JAMES, L.J.:—Suppose it had been proved that the post office had been burnt down, and all the notices destroyed in the fire?]

That would have been an extraordinary case, and I admit that the Registrar would then have had power to direct a new meeting to be summoned. But the present case is a mere ordinary one, and the presence of these creditors would not have affected the result of the meeting. Only a bare majority is required at the second meeting.

[JAMES, L.J.:—If they had been present their arguments might have induced the other creditors to vote differently.]

Rule 309, which deals with an analogous state of circumstances, provides that, if a creditor is resident abroad, and could not have received the notice of the meeting in time to enable him to attend, he may shew cause against the resolution, notwithstanding its registration; but it is not to be disturbed, unless it can be proved that, if the creditor had been present and had dissented, the resolution could not have been carried by the statutory majority; and unless also the Court is of opinion that it is unjust or inequitable that the resolution should be binding on him.

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JAMES, L.J.:—

I think we are bound by the decision of the Registrar. It is his duty to see whether notice of the meeting has been given to the creditors in the prescribed manner, and he has come to the conclusion in this case that notice had not been given. Several of the creditors swear that they had not received any notice. The Registrar came to the conclusion that there must have been some miscarriage, and all he has done is to give liberty to the debtor to summon a fresh second meeting. This could do no harm to any one, and if it is true that a large majority of the creditors is in favour of confirming the resolution to accept a composition, the whole thing could have been settled in a short time and at much less expense than by bringing this appeal. I am of opinion that the Registrar's order cannot be disturbed.

BAGGALLAY, L.J.:—

I am of the same opinion. Under sect. 126, which relates to composition, it was necessary that there should be some one to decide whether all the requirements of the Act had been complied with before the registration of resolutions, and that duty is imposed on the Registrar. That provision is carried out, and indeed almost in terms repeated, by rule 295, which says that the Registrar, before registering the resolution, is to be satisfied "that the requirements of the statute and of these rules have been complied with," and, if he refuses to register, he is to certify the grounds of his refusal. Rule 256 only provides that "all first general meetings shall be summoned as follows," and this provision is by rule 282 extended to second general meetings. Sect. 126 requires that, in the case of a composition, the resolution accepting it shall be confirmed at a second meeting, of which notice has been given in the prescribed manner. It is admitted by Mr. *De Gex* that there might be cases in which, notwithstanding proof of the posting of the notices, it must be held that the creditors had had no notice, for instance, if it were proved that the post-bag had been utterly destroyed by fire. In the present case there is evidence upon which the Registrar has certified that he is satisfied that "the objecting creditors had not received the notices sent to them of the second meeting," and under such circumstances I

think it was clearly within his jurisdiction, and that it was his duty, to make the order which he has made.

THESIGER, L.J.:—

I think that Mr. *De Gex* is right in saying that rules 97 and 98 apply only to bankruptcy, and do not apply to liquidation by arrangement or composition, in regard to which there is a distinct code of rules, beginning with rule 252. But rule 97 affords a presumption that the Registrar would in cases of liquidation or composition have a discretion given to him similar to that which is given to the Court by that rule. Starting with that *à priori* probability, we find that sect. 126 requires that notice of the meetings shall be given to the creditors in the prescribed manner, and then rule 295 requires that the Registrar shall be satisfied that the requirements of the statute and of the rules have been complied with. Notice is to be given to the creditors, but there is no rule which prescribes any time at which the notice is to be deemed to have been given other than the time when it is received. But, as in the case of bankruptcy, rule 256 prescribes the manner in which notices are to be prepared and posted, and says that an affidavit of the posting is to be made by the person posting the notices. I think that affidavit would be *primâ facie* evidence that the persons to whom the notices were posted received them. But there is nothing to limit the effect of the statute, or to prevent the Registrar from looking beyond *primâ facie* evidence—in other words, from satisfying himself whether the notices have in fact been received. He has a judicial discretion in the matter, and, except in a very strong case, we should not be justified in interfering with his exercise of it.

JAMES, L.J.:—

I understand that the Registrar proceeded on the ground that there had been some mistake about the delivery of the notices, and not merely that a single notice had not been received.

Solicitor for Debtor: *James Neal.*
Solicitors for opposing Creditors: *May, Sykes, & Batten.*

C. A.
1880
Jan. 15.

Ex parte DITTON. *In re* WOODS.

Proof in Bankruptcy—Solicitor's Bill of Costs—Taxation—Charges for addressing and posting Documents for Client—6 & 7 Vict. c. 73, s. 37.

A solicitor who tenders a proof in the bankruptcy of his client, in respect of costs due to him by the client, is not entitled to insist on having his bill referred for taxation to the Taxing Master, but the Registrar has jurisdiction to determine the amount due, availing himself, if necessary, of the advice of the Taxing Master.

A solicitor has no statutory right to have the amount of his charges ascertained by taxation only.

A solicitor is not entitled to charge a profit upon the addressing and posting of documents for his client.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy, affirming the decision of the trustee in the bankruptcy of *W. Woods*, *E. G. Woods*, and *H. Woods*, which rejected in part a proof tendered by Mr. *A. G. Ditton*, a solicitor.

The matter in dispute was a bill of costs claimed by *Ditton* to be due to him in relation to professional services which had been rendered by him to the bankrupts. The amount of this bill, down to the date of the filing of a liquidation petition by the bankrupts, was £574 7*s.* 3*d.* The trustee had admitted the proof for these costs to the extent of £400 only. The bill included the following items:—

		£	*s.*	*d.*
"April 27 to 29.	Instructions for prospectus .	3	3	0
	Drawing same and copy for printer	10	10	0
	950 copies of prospectus, addressing, postages, &c. . . .	95	0	0
	Instructions for and drawing circular to accompany same .	2	2	0
	900 copies of same . . .	90	0	0
May 8.	Instructions for and drawing circular .	1	1	0
	900 copies circular, addressing, postages, &c.	67	10	0
		£269	6	0"

The prospectus and circulars mentioned in the bill related to a company which it was proposed to form to purchase the business of a proprietary club which had been carried on by the bankrupts. *Ditton* appealed from the decision of the trustee. A printer was called by the trustee as a witness, and the copies of the prospectus and the circulars were shewn to him. He said that his charge for setting up the prospectus in type and printing off 1000 copies would be from £3 10*s.* to £3 15*s.*, and that his charge for lithographing either of the circulars and printing off 1000 copies would be £2 2*s.* During the hearing by the Registrar he consulted the Taxing Master in Bankruptcy as to what would be allowed on taxation of the bill in respect of the three items of £90, £95, and £67 10*s.* The Taxing Master said that 3*d.* would have been allowed on each copy to cover postages, &c. That would have amounted to £33 6*s.* in respect of those three items, and the bill would have been reduced to £355 3*s.* 3*d.* *Ditton* insisted that he had a right to have his bill referred for taxation in the ordinary way under the *Solicitors Act.* The Registrar affirmed the trustee's decision. *Ditton* appealed.

Sir *H. Jackson*, Q.C., and *Houghton*, for the Appellant:—

The bill ought to have been referred to the Taxing Master for taxation. The Registrar disapproved of the charges in relation to the prospectus and circulars.

[JAMES, L.J.:—Those charges appear to me to be shocking.]

These are not costs in the bankruptcy, and a solicitor has a statutory right to have his bill of costs taxed: 6 & 7 Vict. c. 73, s. 37.

[JAMES, L.J.:—If the solicitor brought an action for the amount of his bill, the client might take the case before a jury. A solicitor has no absolute right to the taxation of his bill.

COTTON, L.J.:—If the client had not applied to have the bill taxed, that would be a strong point against him. But taxing is not the only way of ascertaining what is due.

JAMES, L.J.:—What authority is there for saying that a Plaintiff can get a verdict without proving his debt?]

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A solicitor of course could not do that so long as his bill was taxable.

[JAMES, L.J.:—Is there any authority shewing that, after the expiration of the twelve months allowed for taxation, a solicitor need only put in his bill in order to get a verdict for the amount?]

We do not know of any such authority. But the Appellant is willing to go before the Taxing Master. He is entitled to a profit on the circulars.

[JAMES, L.J.:—Not for addressing them and sending them to the post. If a solicitor had to prove the posting of a document as evidence of its being sent, that would be professional work for which he would be entitled to charge. But posting letters in the ordinary way is not professional work.]

Winslow, Q.C., and *Bigham*, for the trustee, were not heard.

JAMES, L.J.:—

It is utterly impossible for us to interfere with the decision of the Registrar. When a solicitor tenders a proof in bankruptcy, the Registrar has a right to deal with it, taking proper assistance, if he thinks it necessary to do so. A solicitor has a right, under sect. 37 of the Act, to apply for taxation of his costs after the expiration of a month from the delivery of a signed bill to his client. But in the present case no signed bill has been delivered, and, indeed, though the Act prevents the solicitor from bringing an action for his costs until he has delivered a signed bill, that does not apply to a proof in bankruptcy.

BAGGALLAY, L.J.:—

I am of the same opinion.

COTTON, L.J.:—

The only question is whether the Registrar has rightly disallowed some items in the Appellant's bill of costs, on the ground that the charges are excessive. Sir *Henry Jackson* says that a solicitor is entitled to have his bill taxed in the ordinary way. But taxation is not the only way in which the client

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is entitled to protect himself. No doubt, in an ordinary case, a Judge and a jury would not go through the items of a solicitor's bill, which would be much better dealt with in the Taxing Master's office. In the present case there are really only these items in dispute, and they all involve the same principle, and, a solicitor not having any statutory right to have the proper amount of his charges ascertained in one way only, I think that the Registrar was entitled to deal with the case as he did, taking the advice of the Taxing Master.

Appeal dismissed with costs.

Solicitor for Appellant: *A. G. Ditton.*
Solicitors for Trustee: *Pritchard, Englefield, & Co.*

Ex parte LEAROYD. *In re* LUTTMAN.

C. A.
1880
Jan. 15.

Bankruptcy Petition—Adjudication—Withdrawal of Debtor's Notice to dispute Petitioning Creditor's Debt—Right to dispute Debt on hearing of Petition—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 8, 9—*Bankruptcy Rules*, 1870, *rr.* 36, 38.

A debtor against whom a bankruptcy petition had been presented, gave notice, under rule 36 of the Bankruptcy Rules, 1870, of his intention to dispute the petitioning creditor's debt. He afterwards withdrew the notice, but on the hearing of the petition, without having given a fresh notice, he claimed the right to dispute the amount of the debt, on the ground that, since the withdrawal of the notice, he had made a payment to the creditor which reduced the debt below £50. The creditor was not present, and the Registrar dismissed the petition:—

Held, that the debtor was not precluded from disputing the amount of the debt, but that the creditor ought to have an opportunity of giving evidence to contradict the debtor; and the petition was referred back to the Registrar for this purpose.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

On the 6th of August, 1879, a bankruptcy petition was presented by *Nehemiah Learoyd* against *John Luttman*, the act of bankruptcy alleged being the non-compliance with a debtor's summons which had been served on him by *Learoyd* in respect of an alleged debt of £70. On the 22nd of August *Luttman* gave notice of his

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intention to dispute the petitioning creditor's debt. On the 26th of August the petition came on to be heard, and the hearing was by consent adjourned to the 19th of September. On that day *Luttman* withdrew his notice of the 22nd of August. The petition ultimately came on to be heard on the 11th of December. The petitioning creditor was not present himself, but was represented by a clerk. *Luttman* proposed to dispute the amount of the alleged debt. He had given no fresh notice of his intention to do so. *Learoyd's* clerk objected that, as the notice had been withdrawn, the debt could not be disputed, and asked that the hearing might be, at any rate, adjourned, to enable *Learoyd* to be present. The Registrar refused to allow an adjournment, and *Luttman* was then examined, and stated that he had paid *Learoyd* £50 on account of the debt since the filing of the petition. He alleged that this payment had been made after the withdrawal of his notice to dispute. The Registrar dismissed the petition.

Learoyd appealed.

E. Cooper Willis, for the Appellant:—

The Appellant denies that the payment was made on account of this debt. There being no notice in existence of an intention to dispute the debt, the debtor was not entitled to do so: *Bankruptcy Act*, 1869, ss. 8, 9; Bankruptcy Rules, 1870, r. 36. At any rate the petition ought not to have been dismissed without giving the Appellant an opportunity of giving evidence in contradiction to that of the debtor: *In re Dale* (1); Bankruptcy Rules, 1870, r. 38.

The Debtor in person contended that the Registrar's order was right.

JAMES, L.J.:—

The case must go back to the Registrar that the Appellant may have an opportunity of adducing his evidence.

BAGGALLAY and COTTON, L.JJ., concurred.

Solicitors for Appellant: *Learoyd, Learoyd, & Peace.*

(1) 3 Ch. D. 322.

In re CAMPBELL (A LUNATIC).

C. A. 1880 Jan. 17.

Lunatic—Order to inspect Documents deposited by Lunatic.

Before a committee had been appointed of a lunatic's estate the Court made an order for the Official Solicitor to inspect the securities and other documents which the lunatic had deposited with a company for safe custody.

J. CAMPBELL was found a lunatic by inquisition on the 9th of December, 1879, but no committee had been yet appointed.

The lunatic had, before he was found to be of unsound mind, deposited certain foreign bonds and other securities with the *National Safe Deposit Company*. They were kept in a box, of which he had one key and the company the other.

The next of kin, who had petitioned for the inquisition, applied to the company for permission to inspect the documents deposited with the company, in order to obtain the report of the Master as to the nature and amount of the lunatic's property, and have a committee appointed. The company declined to allow the box to be opened without an order from the Master in Lunacy; and the Master, doubting of his power to make the order, the next of kin presented a petition to the Court asking an order for inspection.

Everitt appeared for the Petitioners.

THE COURT (*James*, *Baggallay*, and *Cotton*, L.JJ.) made an order that the Official Solicitor in Lunacy should inspect and make a schedule of the documents deposited by the lunatic with the company. The costs of the application to be costs in the lunacy.

Solicitors: *Combe & Wainwright.*

C. A.
1879
V.-C. B.
Feb. 19.
C. A.
Dec. 5.

GASKIN *v.* BALLS.

[1877 G. 93.]

Practice—Restrictive Covenants—Mandatory Injunction.

An estate was laid out for building and sold in lots, and the purchasers of the different lots executed a deed by which they covenanted with the vendor not to erect any buildings beyond a certain line, the covenant being subject to a proviso that it should not be personally binding on any one except in respect of breaches committed during his sole or joint seisin of the lot to which it related. In 1872 the purchaser of Lot B built upon it a bakehouse beyond the line. The Plaintiff about the same time bought the opposite Lot A. No complaint appeared to have been made by any one of the erection of the bakehouse until this action was commenced. In 1876 the Defendant purchased the residue of a mortgage term in Lot B, and in 1877 commenced building upon that plot a wooden stable beyond the line. The Plaintiff, as soon as he heard of this, wrote to complain on the 17th of March, 1877, at which time the stable was built up to the eaves The Defendant proceeded to complete the stable, which was finished on the day on which the Plaintiff commenced an action for an injunction to restrain the Defendant from allowing any buildings to continue on his land beyond the line:—

Held, by *Bacon*, V.C., that a mandatory injunction ought to be granted to compel the removal of all the erections on the Defendant's plot beyond the line.

Held, on appeal, that the injunction ought not to extend to the building which had been allowed to remain for five years without complaint, but must be confined to buildings erected since the Defendant acquired his title.

Baxter v. *Bower* (1) explained.

The *Judicature Act*, 1873, s. 25, sub-s. 8, has not altered the principles on which the Court acts in granting injunctions.

IN August, 1864, a freehold estate was put up for sale in lots for building, subject to a condition that all the purchasers should observe a certain frontage line.

By an indenture dated the 3rd of October, 1864, made between the purchasers of the different lots of the one part and the vendor of the other part, each of the purchasers, for himself, his heirs, executors, and administrators, covenanted with the vendor, his heirs, appointees, executors, administrators, and assigns (*inter alia*), that no building or erection of any kind whatever (other than dwarf walls not exceeding six feet in height) should be erected

(1) 23 W. R. 805.

beyond the line called the building line shewn by dotted lines on a plan in the margin of the deed. The deed contained a proviso that no covenant therein contained should be personally binding on any person or persons except in respect of breaches committed during the time of his or their sole or joint seisin of or title to the lot or lots of land in relation to which such breaches should have been committed.

Lots 1 and 2 were purchased by and conveyed to *William Purvis*, who executed the above deed of covenant. Lots 6 and 7, which were situate opposite to Lots 1 and 2, and separated from them by a new road called *Whytecliffe Road*, were sold to other purchasers, who executed the deed of covenant. Lots 6 and 7 were afterwards conveyed to the Plaintiff in January, 1872.

On the 18th of September, 1876, the Defendant purchased Lots 1 and 2 for the residue of a mortgage term created by a mortgage by way of underlease dated the 25th of June, 1872. The Defendant's title-deeds did not contain any reference to the restrictive covenant, but the Court considered it to be established that he purchased with notice of it.

In the early part of the year 1872 the then owner of Lots 1 and 2 had built upon the ground beyond the building line a bakehouse with a loft over it to the height of about twelve feet exclusive of the roof. It did not appear that any complaint was made of this erection until the commencement of the present action.

In the early part of the year 1877 the Defendant commenced erecting upon his ground beyond the building line a stable with a loft over it to the height of about fifteen feet. The erection was of tarred wood with a slated roof. The Plaintiff, about the 17th of March, 1877, was informed that the building of this stable was going on, and at once instructed his solicitors to write to the Defendant, which they did on the 17th of March. At that time the stable was built up to the eaves. On the 19th of April, 1877, the Plaintiff commenced this action, asking for an injunction to restrain the Defendant from permitting the buildings already erected beyond the building line to continue upon the ground, and from erecting or permitting to continue upon the ground any erections, other than dwarf walls not exceeding six feet in height,

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nearer to the *Whytecliffe Road* than the building line. The stable was just completed when the writ was issued.

The action was tried before Vice-Chancellor *Bacon* on the 19th of February, 1879.

Sir *H. Jackson*, Q.C., and *Oswald*, for the Plaintiff:—

Where covenants are entered into by a set of purchasers as part of a general scheme, any one of them may obtain an injunction: *Western* v. *Macdermott* (1). In the case of a covenant it is not necessary to prove damage: *Lord Manners* v. *Johnson* (2). The covenant gives a right to apply to a Court of Equity: *McLean* v. *McKay* (3).

Swanston, Q.C., and *Bardswell*, for the Defendant:—

There is no notice of the covenant in the Defendant's title deeds, and he is not bound by it. The Plaintiff has no right to enforce the covenant: *Master* v. *Hansard* (4); *Renals* v. *Cowlishaw* (5). There have been waiver and acquiescence. The Plaintiff knew of all the encroachments except the stable six years ago.

[*Luker* v. *Dennis* (6) was also referred to.]

Sir *H. Jackson*, in reply, referred to *Feilden* v. *Slater* (7); *Cooke* v. *Chilcott* (8); *Baxter* v. *Bower* (9).

BACON, V.C.:—

The cases relied on by Mr. *Swanston* do not appear to me to be applicable to the present case. There is here a general building scheme, under which each purchaser enters into covenants with the vendor which are for the benefit of all the purchasers. That is a case quite distinct from cases in which, there being no general scheme, a person sells a part of his property to a purchaser with a restrictive covenant for his own benefit, and sells the remainder to another person without giving him any notice of the covenant. In such a case as that there is no privity between the two purchasers, and the second purchaser has no right to the benefit of the covenant.

(1) Law Rep. 2 Ch. 72.
(2) 1 Ch. D. 673.
(3) Law Rep. 5 P. C. 327.
(4) 4 Ch. D. 718.
(5) 9 Ch. D. 125; 11 Ch. D. 866.
(6) 7 Ch. D. 227.
(7) Law Rep. 7 Eq. 523.
(8) 3 Ch. D. 694.
(9) 23 W. R. 805.

It is said that the covenant does not run with the land. Whether it runs with the land so as to give a legal right is immaterial, it creates equitable rights to which every one who purchases some of the lots on the faith of the covenant is entitled, as against persons who purchase with notice the lot to which the covenant relates.

Then the Defendant urges that he acquired his interest without notice of the covenant. Upon the evidence I hold it to be clearly proved that the Defendant when he bought had full notice that the property was subject to restrictive covenants. Then is he to be heard to say that because he is a lessee, and his lease contains no reference to the covenants, therefore, he is not bound by them? I take it to be clear law that a lessee is to be taken to have notice of everything which could be learnt by an ordinary investigation of the lessor's title; if that were not so the effect of restrictive covenants might always be practically taken away.

I am, therefore, clearly of opinion that the covenant is enforceable in Equity against the Defendant. As soon as the Defendant began to build his stable the Plaintiff remonstrated. The Defendant did not choose to desist, but with all haste completed his building, and he now contends that it is not the course of the Court to compel the removal of a building which has been completed before proceedings have been commenced. I cannot allow the Defendant to avail himself of this defence, as he proceeded after full notice that the Plaintiff objected to what he was doing.

The question as regards the bakehouse is more difficult, since it has been allowed to stand so long without any complaint. Still the erection of it was a wilful violation of the covenant, and as the Defendant when he bought the property knew that the bakehouse ought not to be there, I think the justice of the case requires that the mandatory injunction should extend to this as well as to the more recent erections.

The Defendant appealed. The appeal was heard on the 5th of December.

Hemming, Q.C., and *Bardswell*, for the Appellant:—

There ought not to be any mandatory injunction, damages being a sufficient remedy: *Lady Stanley of Alderley* v. *Earl of Shrews-*

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bury (1), following the principle laid down in *Isenberg* v. *East India House Estate Company* (2); *Aynsley* v. *Glover* (3).

[JAMES, L.J., referred to *Krehl* v. *Burrell* (4).]

At all events there cannot be any remedy as to the buildings which had been standing without complaint for more than five years before the action was brought.

Sir *H. Jackson*, Q.C., and *Oswald*, for the Plaintiff:—

The assignee of a plot of land forming part of an estate laid out under a building scheme, if he takes it with notice of restrictive covenants, is bound by them, and we submit that he will be obliged to remove buildings erected in contravention of them. The jurisdiction of the Court is extended by the *Judicature Act*, 1873, s. 25, sub-s. 8, and a mandatory injunction may be granted in cases in which it would not formerly have been granted. The case of *Baxter* v. *Bower* (5) is an authority for compelling a building to be removed though no complaint was made until after it was completed.

JAMES, L.J.:—

At the time when the Defendant purchased his land there were standing on it buildings erected in breach of the covenant, of the erection of which no one had complained at the time. He found them there and allowed them to remain. He took his land with notice of the covenant prohibiting them, but no complaint was made of their being there. He proceeds to erect fresh buildings beyond the line, and then the Plaintiff comes for a mandatory injunction to have all the buildings beyond the prescribed line pulled down. After an acquiescence of five years there cannot be a mandatory injunction as to the buildings erected in 1872, nor can any damages be given in respect of them, as the deed of covenant expressly provides that no one shall be personally liable in respect of breaches not committed during the period of his own possession. The injunction must be confined to restraining the Defendant from permitting to remain the

(1) Law Rep. 19 Eq. 616.
(2) 3 D. J. & S. 263, 272.
(3) Law Rep. 18 Eq. 544; Ibid. 10 Ch. 283.
(4) 7 Ch. D. 551; 11 Ch. D. 146.
(5) 23 W. R. 805.

buildings which have been erected beyond the line since he purchased, and from erecting buildings in contravention of the covenant.

BAGGALLAY, L.J.:—

The erection of the bakehouse was a breach of covenant by the Defendant's predecessor in title, but the covenant is only personally binding in respect of acts done during ownership. It would be going further than any decided case to enforce the covenant against the Defendant in respect of acts done before he became owner, and even as against the party who erected the bakehouse there could be no remedy after such acquiescence.

THESIGER, L.J.:—

I am of the same opinion. It is said that the *Judicature Act* alters the principles on which the Court is to proceed in such cases as the present. I see no ground for that contention. The Act has somewhat enlarged the powers of the Court, but in the matter of injunctions it has done nothing to alter the principles which have been laid down as to the exercise of its powers, where principles have been established as being just and convenient. The Court will rarely interfere to pull down a building which has been erected without complaint. *Baxter* v. *Bower* (1) was a very special case—just one of those exceptions which prove the rule *in non exceptis.*

Solicitors: *Hogan & Hughes; Marson & Dadley.*

(1) 23 W. R. 805.

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[1878 B. 102.]

Lease of Dissenting Chapel—Non-inrolment—Charitable Purposes—Mortmain Act (9 *Geo.* 2, *c.* 36)—*Non-payment of Rent for Twenty Years—Payment of Arrears—Statute of Limitations* (3 *& 4 Will.* 4, *c.* 27), *s.* 34.

By a lease to six persons described as trustees, a building used as a dissenting chapel, though not so described, and reserving to the lessors a right of access to their pews therein, was demised for ninety-nine years, with a covenant for renewal, at the yearly rent of 1*s*. The lease was not inrolled. New trustees of the chapel had been appointed under the provisions of 13 & 14 Vict. c. 28. Shortly before the expiration of the term the trustees served the reversioner with a notice for renewal. At that time no rent had been paid for above twenty years, but some of the arrears were then paid to and accepted by the reversioner. The reversioner refused to renew the lease. Five years afterwards he brought an action against the trustees to recover possession of the building:—

Held, that the lease was a grant for charitable purposes, and was void under the *Mortmain Act* (9 Geo. 2, c. 36):

Held, also, that the Plaintiff's right of action was not extinguished under sect. 34 of the *Statute of Limitations* (3 & 4 Will. 4, c. 27).

Semble, if the lease had contained a power for the trustees to sell the chapel and apply the money to other purposes, it would still have been a grant for charitable purposes within the meaning of the *Mortmain Act*.

THIS was an action by the Plaintiff, who had purchased the reversion of the freehold property comprised in the lease hereafter mentioned, to recover possession thereof from the Defendants, who claimed an interest therein as lessees.

By a lease, dated the 2nd of December, 1774, a certain piece or parcel of ground, with the building thereupon erected and the appurtenances, were demised by *H. Fawconer* and *John Fawconer* to the six persons therein named and their assigns for ninety-nine years at the yearly rent of 1*s*. The lease contained a covenant by the lessees that it should be lawful for *H. Fawconer* and *John Fawconer* and their heirs during the said term to use and enjoy the door into the said building on the north side thereof for the purpose of going to and from their pews therein with their family and friends; and it was thereby agreed between the parties as follows:—"that when any three of the said trustees shall die the

survivors of them shall within three months next after the death of the third of them so dying elect and choose three other proper persons to be trustees in the room and stead of the said persons so dying, in order to keep up the number of six trustees, and that this lease shall be assigned to such new trustees together with the surviving trustees, and so from time to time as often as such deaths shall or may happen during the continuance of this present lease." And it was also covenanted and agreed that if the lessees or their assigns should at any time before the end and expiration of the term of ninety-nine years thereby granted give to *H. Fawconer* and *J. Fawconer*, their heirs or assigns, or to such persons as should then be seised of the freehold of the said ground and premises, notice in writing of their intention and desire of having and taking a new lease of the same ground and premises for a further term of ninety-nine years, to commence and be computed from the last day of the term of ninety-nine years thereby granted, then and in such case, and upon such notice in writing being so given as therein mentioned, and upon payment of the sum of 1*s.* by the said lessees or their assigns, that they the said *H. Fawconer* and *J. Fawconer*, their heirs or assigns, or such other person as aforesaid, should grant and execute to the said lessees or their assigns a new lease of the same ground and premises for the further term of ninety-nine years, to commence and be computed as aforesaid, at and under the same yearly rent, covenants, and agreements hereinbefore mentioned, together also with a covenant for renewing the same for a further term of ninety-nine years, upon such and the same terms and conditions as were expressed in the covenants for the renewal therein.

At the time when the lease was granted the said building was used as a chapel of the Independent or Congregational body, though it was not so described in the lease, and the building continued afterwards to be so used. About thirty-five years before the expiration of the term the old chapel was pulled down and a new one erected partly on the old site and partly on ground not comprised in the lease.

The lease had not been inrolled under the provisions of the *Mortmain Act*, 9 Geo. 2, c. 36.

Several appointments of new trustees of the property comprised

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in the lease had been made from time to time, and, on the 28th of May, 1873, all the trustees having died or resigned, at a meeting of the body called "Church Members," in whom the appointment of new trustees was vested, which meeting was duly convened and held in the chapel under the provisions of *Sir Morton Peto's Act* (13 & 14 Vict. c. 28), the present Defendants were appointed trustees of the chapel and premises, and the same were vested in them accordingly, and a memorandum of such appointment was signed by the chairman pursuant to the schedule to the said Act.

By a notice in writing dated the 16th of June, 1873, and addressed to and duly served upon the Plaintiff and his then trustee in bankruptcy, the Defendants required them to grant to the Defendants a lease of the premises comprised in the lease for a further term of ninty-nine years, and they paid to the Plaintiff and his trustee the sum of 1*s.* each in order to entitle them to such renewal, and the said sums were accepted by the Plaintiff and his trustee. They at the same time paid to each of them, the Plaintiff and his trustee, a few shillings as arrears of rent, and such sums were so accepted.

The Plaintiff refused to renew the lease, and, in 1877, brought an action against the present Defendants to recover possession of the chapel. The Defendants by their statement of defence to that action admitted that the lease of the 2nd of December, 1774, was made to the lessees as trustees of an Independent Chapel, and that the Defendants were the then trustees of the chapel built on the demised premises. Judgment was given against the Plaintiff in that action on the ground that the chapel and premises had not been conveyed to and were not vested in the Plaintiff.

By a subsequent indenture of the 4th of February, 1878, the property comprised in the lease was duly conveyed to the Plaintiff in fee.

On the 26th of February, 1878, the Plaintiff commenced the present action against the Defendants, alleging by his statement of claim that the lease had not been inrolled, and claiming possession of the premises therein comprised.

The statement of defence alleged that the lease of the 2nd of December, 1774, was not a grant in trust or for the benefit of any

charitable use within the meaning of the *Mortmain Act;* also that for a period of twenty years ending the 16th day of June, 1873, the Defendants and their predecessors in title paid no rent to the Plaintiff or his predecessors in title in respect of the premises comprised in the lease, nor did they by writing or otherwise acknowledge the Plaintiff's title. They relied on the *Statute of Limitations.*

Ince, Q.C., and *Colt*, for the Plaintiff, contended that this was a lease for a charitable purpose for a nominal consideration, and that, as it had not been inrolled pursuant to the *Mortmain Act* (9 Geo. 2, c. 36), it was void, and the Plaintiff, in whom the reversion was now vested, was entitled to recover possession.

Davey, Q.C., and *George Henderson*, for the Defendants:—

Assuming for the present purpose the lease to be void under the *Mortmain Act*, there was at any rate a legal tenancy from year to year within the meaning of sect. 8 of the *Statute of Limitations* (3 & 4 Will. 4, c. 27). No rent had been paid for a period of upwards of twenty years, ending the 16th of June, 1873. The right of the reversioner was then extinguished by sect. 34 of the Act, and could not be revived by payment of arrears of rent, or by acknowledgment of the Plaintiff's title: *In re Alison* (1); *Brassington* v. *Llewellyn* (2).

JESSEL, M.R.:—

I think I will now give judgment on this point.

The facts are these: A lease in writing which is assumed to be void: rent reserved at 1s. a year which is paid for some time: then an interval of twenty years without any payment: then payment of some arrears, as such, within five years before action brought—Can the Defendants, who are in possession, set up the *Statute of Limitations?* It would be very singular if they could do so. It was admitted that at least a tenancy from year to year had been created and rent paid under the tenancy, but it was said that, under sect. 34 of the statute, the title of the Plaintiff having been extinguished by non-payment of rent for twenty years, he had

(1) 11 Ch. D. 284. (2) 27 L. J. (Ex.) 297.

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now no right or title to bring an action, and that the subsequent payment could be no acknowledgment within the statute of a right which had ceased to exist.

The 8th section provides that "when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant from year to year or other period without any lease in writing" (which I will assume for the present purpose), "the right of the person entitled subject thereto, or of the person through whom he claims to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first year or other period, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)." There are then two periods mentioned when the right of the reversioner can first accrue: if no rent is paid then it accrues at the end of the first year or other period; if rent is paid then it accrues at the last time when any rent shall have been received. Therefore the Plaintiff is right in saying that he has only to prove a payment within twenty years of the commencement of the action. In this case the tenants pay rent within five years; how then can they plead the statute?

The construction contended for would lead to this absurd result: a tenant might pay no rent for twenty years, and then in the twenty-first year he might pay it, and then turn round and say he was the owner in fee simple of the land. The 34th section provides that the right of action shall be extinguished "at the determination of the period limited by this Act" for bringing an action. But the period had not elapsed within which, under sect. 8, an action might be brought; therefore the 34th section does not help the Defendants, and I am of opinion that the *Statute of Limitations* does not apply.

Davey, Q.C., and *George Henderson*, for the Defendants:—

On the main question in the case we contend that there is nothing to shew that the lease of this building was granted for charitable purposes. The word "chapel" is not to be found in the lease. There was nothing to prevent the trustees if they thought fit from converting the building to any other purpose.

That being so, the *Mortmain Act* does not apply, for that is only applicable when the charitable purpose is one which must continue to attach to the property. The fact that new trustees were appointed under the provisions of the Act 13 & 14 Vict. c. 28, is not sufficient to make it a charity. This being so, inrolment was not necessary; the Defendants were entitled at the expiration of the term to have the lease renewed according to the covenant, and the Plaintiff cannot establish his claim to possession.

JESSEL, M.R.:—

This is certainly a very singular action, and I believe that in no country in the world but in *England* could such an action have been maintained. The Plaintiff has by purchase this kind of title: There was a piece of land belonging to owners in fee simple, which they agreed to let for ever to the trustees of an Independent Chapel in the year 1774. They accordingly granted them a lease for ninety-nine years at 1*s.* a year, with a covenant, at any time before the end of the term, to renew for another ninety-nine years, being what is generally called a lease for ninety-nine years with perpetual renewal. For all substantial purposes it was a grant in perpetuity in fee simple. This document was not inrolled, and the present Plaintiff, being the purchaser of the reversion of that lease, brings an action to recover possession of the property, such as used to be called an action of ejectment, on the ground that, by reason of the non-inrolment of the lease, it was obnoxious to the provisions of a statute which is commonly called the *Statute of Mortmain*—it being for a charitable use—and was void, and that consequently the covenant for renewal contained in it was void, and the notice of such renewal given by the present trustees of the chapel nugatory.

I suppose I have no right to say that I regret being compelled so to decide, because a Judge has nothing to do but to administer the law as he finds it. But I am compelled so to decide, because, on the evidence before me, it is plain that there was a trust of the whole of this property as a chapel, for the worship of that description of Dissenters called Independents, or Congregationalists.

The evidence is this: It is first of all proved or admitted that for the whole period it has been so used, and it is pretty good

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evidence of a trust if 105 years' user can be proved. In the next place, both in the lease itself and in all the subsequent documents, the lessees are described as trustees. In the third place, you find that in the original lease there is a reservation of a right of access to pews. Fourthly, we find an admission in an action between the same Plaintiff and the same Defendants that the lease was made to the original lessees as trustees of an Independent Chapel. Then it is admitted that the chapel was built at the time when the premises were demised by the indenture of the 2nd of December, 1774. Lastly, we have this: that after several assignments all the trustees died, or had resigned, and on the 28th of May, 1873, at a meeting of the church members, in whom the power of appointing new trustees was vested under the provisions of the 13 & 14 Vict. c. 28 (commonly called *Sir Morton Peto's Act*) new trustees of the chapel were elected, and under the provisions of that Act the lease became vested in those new trustees. It appears to me that that makes the evidence quite complete; and there is nothing whatever to shew that either the present congregation or any past or any future congregation could put an end to the trusts and convert the chapel to their own use, or any other use beyond the religious use upon which it has been held for so long.

As regards *Sir Morton Peto's Act*, it seems to me plain that that was intended to apply to property held upon charitable uses. The title of the Act is "to render more simple and effectual the titles by which congregations, or societies for the purposes of religious worship, or for the promotion of education in *England* and *Ireland*, hold property for such purposes." The recital is to the same effect as the title, repeating the words as to holding the property required for such purposes; and the body of the Act relates to "property acquired by any congregation or body of persons associated for religious purposes or the promotion of education," thus comprehending property acquired as well as held, and that meaning becomes quite plain when you look at the 3rd section, which is "for the purpose of preserving evidence of every choice or appointment of a new trustee or trustees and of the person or persons in whom such charitable estates and property shall from time to time become legally vested." Therefore, whether you look at the title of the Act, or the recital of the Act, or the enacting part of the Act, or

the final references, it appears to me plain that it is an Act intended to apply to bodies associated together for charitable purposes, and holding their property for such purposes. And I should say that the way in which this congregation has acted is pretty conclusive proof (under that Act) of the property being held for charitable purposes.

But there is really no evidence the other way at all. The only argument—and I must say that this is a case in which every argument may properly and fairly be brought forward on the part of the Defendants—was a very ingenious one. It was said that the charitable uses, or *Mortmain Act*, as it is called, only applied to property held for charitable purposes, and that the congregation, or body, or the association, or whatever it was, could put an end to the charitable purpose at any time, and convert the particular property to its own use or any other use, and that this lease did not come within the scope of the Act, because it was not the perpetual alienation which the Act was intended to put an end to.

Whether that is so or not, in the first place it must be shewn by evidence that there is a power in the congregation to put an end to the charitable or religious uses, but no such evidence appears. There is no evidence of any declaration of trust but that which I have mentioned, which is, in my opinion, very cogent evidence indeed to shew that the property has been devoted to religious purposes, and that amounts to charitable purposes. Therefore, the real point which was argued does not arise, but I am far from saying that I should decide otherwise, even if there had been shewn to be a power to sell or something of that kind in the deed.

It seems to me that the Act of 9 Geo. 2, c. 36, must be construed with a view to fairly carrying out its provisions, which were intended to prevent the alienation of property to charitable purposes, and the construction contended for, even if there was a power vested in any body of men to change the destination of the property, which might be exercised beyond the legal limit of perpetuities, would really amount to a repeal of the Act. It is not necessary for me to decide that now, but it seems to me that to decide that the mere existence of such power in a body of this

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class (which might exist for ages without being exercised) would induce all the mischiefs which the Act was intended to prevent, namely, the too remote a period within which property is made inalienable. But that is really the meaning of the Act. It is because the law allows charities to exist for an indefinite period, and beyond the limit of years which we commonly define by the rule against remoteness, that it was necessary to prevent such alienation without certain safeguards, so as to obviate the mischief of too large a proportion of the property of the country being vested in bodies or trustees for such purposes. It is not, however, necessary for me to decide that, but I do decide the case on the other ground, that it has not been shewn by any evidence whatever that there was any power in any one of putting an end to the religious trusts for which the property was undoubtedly intended. That being so, the Plaintiff is entitled to recover possession of the property described in the lease, and I must give him judgment accordingly and the costs of the action.

Solicitors: *C. A. Swaine; Venning, Robins, & Venning.*

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[1878 M. 215.]

Writ of Attachment — Defaulting Trustee — Person "acting in a fiduciary capacity"—Manager of Testator's Estate—Action for Payment of Money—"Court of Equity"—"High Court of Justice"—Debtors Act, 1869, *s.* 4, *sub-s.* 3—*Debtors Act,* 1878, *s.* 1—*Judicature Act,* 1873, *s.* 76.

The *Debtors Act,* 1869, while abolishing the penalty of imprisonment for debt in the case of an honest debtor, is intended for the punishment of a fraudulent or dishonest debtor, and is in that sense vindictive.

Barrett v. *Hammond* (1) not followed.

A "person acting in a fiduciary capacity" (*Debtors Act,* 1869, s. 4, sub-s. 3) means a person who stands in a fiduciary relation towards any other person who may be entitled to call upon him to pay, whether such other person is or is not the plaintiff, or one of the plaintiffs, in the action in which the order for payment has been made.

Under sect. 76 of the *Judicature Act,* 1873, the words "the High Court of

(1) 10 Ch. D. 285.

Justice" should be read in substitution for the words "a Court of Equity" in sect. 4, sub-sect. 3, of the *Debtors Act*, 1869.

A son in the course of management of one of his father's farms sold part of the farming stock, and received the proceeds. Upon the father's death an action was brought by parties interested in his estate against the son for payment of the moneys received by him, and for accounts. The son having failed to comply with an order made in the action for payment of a sum of money into Court:—

Held, that he was a "person acting in a fiduciary capacity," within sect. 4, sub-sect. 3, of the *Debtors Act*, 1869; and accordingly, the Court not being satisfied that he had not the means of payment, leave was given to the Plaintiffs to issue a writ of attachment against him for non-payment.

The policy and effect of the Debtors Acts, 1869 and 1878, considered.

THIS was a motion by the Plaintiffs for leave to issue a writ of attachment against the Defendant, *George Ingram*, for his non-compliance with an order for payment by him of a sum of £1000 into Court, under the following circumstances:—

On the 1st of January, 1878, *William Ingram*, a farmer, the father of the Defendant, *George Ingram*, executed to the Plaintiff *Brown* a mortgage and bill of sale of farming stock as security for a debt. On the 29th of January, 1878, *William Ingram* died. The Plaintiff *Wright* was his executor and legal personal representative. A creditor's action having been instituted by *Brown* against *Wright* for the administration of *William Ingram's* estate, *Marris*, the first-named Plaintiff in the present action, was appointed receiver in that action; and *Brown* having filed a petition for liquidation, *Marris* was appointed trustee of his estate, and was ordered to continue the administration action as such trustee.

For some time prior to and about the time of *William Ingram's* death, his son, the Defendant, *George Ingram*, was acting as manager of one of his farms. In the course of his management, and after the date of the bill of sale, the Defendant from time to time sold the farming stock and produce of the farm, and received the proceeds. Part of the stock so sold was comprised in the bill of sale, and part not, but what part was so comprised there appeared to be some difficulty in ascertaining. The Plaintiffs alleged that the Defendant had received on account of the sales various sums amounting to upwards of £2250, together with other moneys belonging to his father, but had refused to furnish any account.

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This action was accordingly brought by *Marris*, *Brown*, and *Wright*—*Marris* having obtained leave for the purpose in the administration action—against *George Ingram*, for payment to the Plaintiff *Marris* of the money so received by the Defendant, and for accounts. Upon the trial of the action, on the 24th of July, 1879, accounts were directed, and the Defendant was ordered to pay £1000 into Court to the credit of the action.

The Defendant having failed to comply with the order, the Plaintiffs now moved for leave to issue a writ of attachment against him.

The Defendant filed three affidavits in opposition to the motion. In the first he set out an account of his receipts and payments under the sales, but stated that he was unable to distinguish the proceeds of the property comprised in the bill of sale from the proceeds of the property not comprised therein. From this account it appeared that between the 4th and 25th (both inclusive) of January, 1878, he had received sums to the total amount of £1531 7*s.* 5*d.*, and that he had paid thereout various sums to his father and other persons, and for farm labour and expenses, leaving a balance due from him of £1153 15*s.* 8*d.*

In his second affidavit the Defendant furnished another account, by which he claimed to be entitled to set off a sum of £1600, alleged to be due to him for salary and expenses as manager of the farm from January, 1870, to January, 1878.

In his third affidavit the Defendant said: "I am quite unable to comply with the order for payment of the said sum of £1000: I have no means whatever to enable me to do so. At the present time I am only gaining a precarious living from week to week, and at a weekly salary of, in no case, more than £1, and I am frequently without any employment at all."

On the other hand, an affidavit, filed on the part of the Plaintiffs, stated that ever since his father's death the Defendant had been living at various hotels, and going about from place to place as a gentleman of independent means.

Warmington, for the Plaintiffs, submitted that the Defendant came within the third exception in sect. 4 of the *Debtors Act*, 1869, as being a "person acting in a fiduciary capacity."

Herbert Smith, for the Defendant:—

First, I submit that the Defendant is not "a person acting in a fiduciary capacity" towards any of the Plaintiffs within the meaning of the exception.

Then, according to the words of the exception, such person must have been "ordered to pay by a Court of Equity." That referred to Equity proceedings only, and not to Common Law proceedings. Now this is a mere action of trover, or for money had and received, and is really a Common Law action, and not within the purview of the section.

Then the money is not "in the possession or under the control" of the Defendant, for he swears he has no means of payment whatever. If, however, your Lordship should hold that the Defendant is within the terms of the exception, then I submit the Court should exercise the discretion given by the *Debtors Act*, 1878, and refuse this application on the ground that the imprisonment of the Defendant will not, as his evidence shews, be productive of payment: for the policy of these two Acts, in leaving a defaulting trustee exposed to the penalty of imprisonment is not vindictive, the object of the penalty being simply to produce payment of the money: *Barrett* v. *Hammond* (1); *Street* v. *Hope* (2).

[JESSEL, M.R.:—With great respect, I think the Act of 1869 is vindictive in the sense of meaning punishment.

Warmington:—In *Simpson* v. *Bell* (3) your Lordship declined to follow *Barrett* v. *Hammond*.]

JESSEL, M.R.:—

I wish to say one or two words about the view that I take of the law, because I do not think that the *Debtors Act*, 1869—which, though it abolished imprisonment for debt in certain cases, was, as it in fact says in so many words, legislation "for the punishment of fraudulent debtors"—did not mean punishment.

Now when we come to look at the Act, we find that it contains different provisions to meet different classes of debtors, there

(1) 10 Ch. D. 285.
(2) Ibid. 286, n.
(3) 23 Sol. J. 546; Seton on Decrees, 4th Ed. vol. ii. pp. 1568, 1595.

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being one set of provisions in the case of defaulting debtors of a certain class, and special provisions being made in the case of debtors guilty of misdemeanour or other misconduct; and, looking at these provisions, it is impossible to suppose that punishment for misconduct was not intended to be meted out. That it was contemplated by the Act is clear, because the 4th section, which abolished punishment for debt by imprisonment where a man could not pay, contains the following exceptions: "1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract;" that is, a penalty for tort, or in respect of wrong: then "2. Default in payment of any sum recoverable summarily before a justice or justices of the peace: 3. Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control." Why is such a person as the last excepted? Simply because he is a dishonest man. He need not perhaps be called a thief in so many words, but he is a man who takes or keeps money belonging to other people, and he is to be punished as such.

Then the 4th exception is, "Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such"—that points to punishment again—"or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order:" there the same observation applies.

The next exception, the 5th, is not quite so strong: "Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any Court having jurisdiction in bankruptcy is authorized to make an order:" that is, default by a *quasi* trustee. What it means is this: there are frequently cases of persons in the receipt of salaries or income which cannot be attached for the benefit of creditors directly, and therefore the Court makes an order on the person receiving the salary or income to pay a portion of it for the benefit of his creditors: that portion he receives in a fiduciary capacity for other people: he is a receiver for the benefit of his creditors, and if he applies the money to his own use he is within the exception.

The last exception, the 6th, is, "Default in payment of sums in

respect of the payment of which orders are in this Act authorized to be made:" persons making such default must be excepted because they come under other sections of the Act.

Then there is a proviso, first, that no person shall, in any of the excepted cases, be imprisoned for more than one year; and, secondly, that nothing in the section shall alter the effect of any judgment or order of any Court for payment of money except as regards arrest or imprisonment.

Then we come to a class of more serious offenders who are dealt with by the 11th and following sections, and persons falling within that class are to be liable to imprisonment "with or without hard labour." So that there is to be imprisonment, simply, that is, without hard labour, for the first class of offences, but imprisonment with or without hard labour for the second class: that is to say, in each case there is to be punishment.

Therefore the Act abolishes imprisonment for debt in the case of an honest debtor, but it is at the same time intended for the punishment of a fraudulent or dishonest debtor. It is in that sense vindictive, and intended to be so.

Then we come to the *Amendment Act* of 1878, which was passed to meet a special class of cases, and the history of that Act was this: An application was made before me for the imprisonment of a trustee who had been ordered to pay a sum of money. It was a very hard case, one of an unintentional breach of trust, and though the man was actually dying, I had no alternative but to make an order. Then I had various other cases before me which led me to regret that the Court had no discretion, for it not unfrequently happened that a person who came in strictness under the first class of offences was not guilty of any moral offence. Under these circumstances I thought it would be wise and prudent that a discretion should be given to the Courts to deal with exceptional cases, but not with the intention of repealing the existing Act. Mr. *Marten*, being a member of the Legislature, then adopted my suggestion, and procured this *Amendment Act* to be passed. But it was not intended by this Act to get rid of the penal clauses of the previous Act, but only to give the Judges a judicial discretion to deal with these exceptional cases, which the Legislature did not think of when it passed the previous Act.

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So much for the general scope and objects of the Acts. I will now state what are the facts of the present case.

There was a farmer of the name of *William Ingram* who, having got into debt, executed to his creditor a bill of sale of farming stock. He had a son, named *George Ingram*, who used to manage one of his farms for him. *George Ingram* took advantage of his position by appropriating to his own use money arising from sales of farming stock, part of which was comprised in the bill of sale, and part not. In order to shew what he did I cannot do better than refer to the account which he sets out in his first affidavit. [His Lordship then went through the items, and continued:—] So that from the 4th to the 25th of January, 1878, he received a total sum of £1531 7*s.* 5*d.* which he was perfectly aware did not belong to him. He received the money in a fiduciary capacity. Out of this money he paid various sums to his father and other persons and for farming expenses, leaving a balance due from him of £1153 15*s.* 8*d.* So that in the month of January, 1878, he owed a sum of £1153 15*s.* 8*d.* Then he amused himself by putting in another affidavit, and, in order to absorb the money he had received and kept, he brought in an account claiming, as due to him by way of set-off, a sum of no less than £1600. Then, to make the story complete, I will read his third affidavit, to shew what sort of a man he is. [His Lordship read it, and continued:—]

This shews the sort of rogue I am dealing with. As to merits he has none whatever, and he ought to be sent to prison unless he has no means, as to which I am not satisfied, because he does not tell us what he has done with the £1153 15*s.* 8*d.*

The only remaining point to be considered is whether he is within the exceptions at all. Now he says in his first affidavit that he is unable to distinguish the proceeds of the property comprised in the bill of sale from the proceeds of the property not comprised therein. The mortgagee was not able to do so either; and therefore, taking advantage of that useful Order under the Judicature Acts (Order XVI.) as to the joinder of parties in cases where it is doubtful who ought to be the proper parties, the mortgagee, *Brown*, was made a co-Plaintiff: for, under the present practice, whether the Defendant owes the money to the one Plaintiff or to

the other, or in what proportions he owes it to them, is immaterial. If one only of several co-Plaintiffs is entitled to relief, that is sufficient to give the Court jurisdiction. Now, as regards one of the co-Plaintiffs, the mortgagee, if the money represents the proceeds of property comprised in the bill of sale the Defendant is in a direct fiduciary position. As regards the other Plaintiff, the executor, it may be the Defendant is not in a fiduciary position: he may only stand towards him in the relation of a servant; but at all events he is in a fiduciary position as regards one Plaintiff. I cannot find anything in the Act of 1869 which says that a man who stands in a fiduciary relation towards a Plaintiff, or in fact any one else, is not within the exceptions. The Act means that if he receives the money in a fiduciary relation at all, whether towards the Plaintiff or any other person, he is within the exceptions.

Now, in the present case the Plaintiffs obtained an order from me that the Defendant should pay £1000 into Court. Here then we have an order upon him to pay money received by him while in a fiduciary capacity, and the money being under his authority or control; and that order he has not complied with. Why, then, should I not apply the Act?

It is said that this is really a Common Law action, and that the Act has reference only to an order made in a matter cognizable by "a Court of Equity." But the 76th section of the *Judicature Act*, 1873, says that all Acts of Parliament referring to any particular Court shall be construed as if the "High Court of Justice" had been named therein.

In my opinion, it is impossible to put such a narrow construction upon the Act as has been contended for by the ingenious counsel for the Defendant.

Therefore, having authority under the 76th section of the *Judicature Act*, 1873, I make an order to issue attachment against the Defendant, and that he do pay the costs of the motion.

Solicitors for Plaintiffs: *Crowder, Anstie, & Vizard*, agents for *Owston & Dickinson, Leicester.*

Solicitors for Defendant: *Gold & Son.*

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Nov. 21.

LABOUCHERE *v.* EARL OF WHARNCLIFFE.

[1879 L. 251.]

Club—Conduct of Member—Power of Expulsion after Inquiry—General Meeting—Insufficiency of Notice—Majority of Two-Thirds of Members Present—Injunction.

14 Ch D 478
17 Ch D 625

The rules of a club provided that in case the conduct of any member should in the opinion of the committee, after inquiry, be injurious to the welfare and interests of the club, the committee should call upon him to resign, and in the event of his refusal to do so, should call a general meeting, which was to be called on giving a fortnight's notice, at which it should be competent for the votes of two-thirds of those present to expel such member. The committee having called on the Plaintiff, a member of the club, to resign on the alleged ground that his conduct was injurious to its interests, and the Plaintiff having refused to do so, a general meeting was summoned by notices issued on the 1st of November for the 14th of November, when 117 members were present, of whom 115 voted—77 in favour of a resolution for expelling the Plaintiff, and 38 against it. The resolution was declared to be carried. On a motion to restrain the committee from interfering with the enjoyment by the Plaintiff of the use and benefit of the club:—

Held, on the facts of the case, that the committee had acted without full inquiry and without giving the Plaintiff notice of any definite charge; that the general meeting was summoned without proper notice; that the resolution was carried by an insufficient majority; and that the Plaintiff was entitled to an injunction.

THIS was a motion on behalf of the Plaintiff, Mr. *H. Labouchere*, who was a member of "*The Beefsteak Club*," to restrain the Defendants, the committee of the club, from interfering with the Plaintiff's enjoyment of the use and benefit of the club.

The affairs of the club were regulated by certain printed rules. Rule 20 contained the following provision: "In case the conduct of any member either in or out of the club shall in the opinion of the committee, after inquiry, be injurious to the welfare and interests of the club, the committee of the club shall call upon him to resign, and in the event of his refusal to do so, shall call a general meeting at which it shall be competent for the votes of two-thirds of those present to expel such member."

Rule 31 provided that the committee should at any time have power to call a general meeting on giving a fortnight's notice, either at the request of five members or on their own responsibility.

At the end of September, 1879, an altercation took place between Mr. *Levy Lawson*, another member of the club, and the Plaintiff, whereupon the Plaintiff, on the 4th of October, 1879, addressed a letter of complaint to the committee of the club respecting what had occurred. At a meeting of the committee of the club held on the 10th of October, 1879, the said letter and also a letter of the Plaintiff appearing in a publication called *Truth*, of which the Plaintiff was the editor and proprietor, were read, and it was resolved that the meeting be adjourned and a special meeting of the committee be summoned to consider the matter, and that in the meantime the Plaintiff should be informed that he must enter into an engagement not to make any personal attack upon any member of the club in any publication.

On the 16th of October, 1879, a special meeting of the committee was held when it was resolved that the Plaintiff and Mr. *Levy Lawson* be called upon to resign, in accordance with the terms of Rule 20. This resolution was communicated to these gentlemen, who both wrote letters declining to resign their membership.

At a meeting of the committee held on the 31st of October, 1879, the following notice was ordered to be posted in the club-room, and a copy of the same to be posted to each member of the club:—"A general meeting of the club is hereby called by the committee to be held at the club on Friday, the 14th of November, 1879, to receive the report of the committee upon the decision upon which they have arrived under Rule 20, after inquiry, that the conduct of Mr. *Levy Lawson* and Mr. *H. Labouchere*, members of this club, has been injurious to the welfare and interests of the club, and the committee having consequently called upon them to resign, which each of them has refused to do. At this meeting the following resolution will be proposed, 'That Mr. *Levy Lawson* and Mr. *H. Labouchere* be and are hereby expelled from the club.'"

Mr. *Lawson* having subsequently resigned, the notice of the meeting, which was altered so as to refer to the Plaintiff only, was put up in the club before 3 A.M. in the morning of the 1st of November, which, according to the statement of the secretary, would be reckoned, having regard to the custom of the club, as being done on the 31st of October, on which day the notice was

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dated. Notices were in the course of the 1st of November posted to the members of the club.

On the 14th of November, 1879, the general meeting of the club was held. According to the Plaintiff's affidavit there were 117 members present. The chairman having explained the object of the meeting, two numbers of the said publication called *Truth* were laid upon the table and the attention of the members called to their contents, and especially to a letter and certain articles by the Plaintiff which they contained. The chairman stated that the committee had come to the conclusion that the Plaintiff's conduct in writing and publishing the same was injurious to the interests of the club. The Plaintiff addressed the meeting, and protested against his expulsion, but, according to the evidence, did not take any objection to the proceedings on the score of irregularity or of the insufficiency of the notice.

The chairman put the question thus: Those members who vote for the committee will vote "Aye," and those voting for Mr. *Labouchere* will vote "Nay." The Plaintiff and another member did not vote. The number of members who voted was 115, of whom 77 voted for the committee and 38 for Mr. *Labouchere*. The chairman declared the resolution carried by one vote.

The Plaintiff now moved to restrain the committee from interfering with his enjoyment of the use and benefit of the club.

Chitty, Q.C., and *Romer*, for the Plaintiff:—

The Plaintiff in this case does not appeal from the judgment of the club or of the committee, but against the validity of their proceedings, which are not in accordance with the ordinary principles of justice.

The resolution of the committee at their meeting of the 16th of October, 1879, was passed without giving the Plaintiff any notice of the charge made against him. In fact, the Plaintiff, by his letter which was brought before the committee, made a charge against Mr. *Lawson*. It is true that they gave the Plaintiff notice that they had resolved to call upon him to resign, on the ground that his conduct was injurious to the interests of the club, but they do not appear to have told him the grounds on which that resolution had been come to. They did not make, or call upon the Plaintiff to answer, any definite charge.

Next, we contend that the notice was insufficient. By the 31st rule a fortnight's notice was required for a general meeting, whereas, in this case, the notices were posted on the 1st of November for a meeting on the 14th.

Further, the resolution at the general meeting was not passed by a majority of two-thirds of the members present. According to the Plaintiff's affidavit, there were 117 members present, but only 115 voted, of whom 77 voted "Aye" and 38 "Nay."

Lastly, we contend that the question was not properly put by the chairman to the meeting.

[They referred to *Fisher* v. *Keane* (1).]

Davey, Q.C., and *Macnaghten*, for the Defendants:—

We contend that the evidence tends to shew that the committee arrived at their decision after full inquiry. They had the Plaintiff's letter of the 4th of October before them, and also the numbers of *Truth* which contained his letter and articles, which they appear to have taken into full consideration. The Plaintiff knew perfectly well that the matter was before them, so it cannot be said that he had no notice of the charge. As to the validity of the notice convening the general meeting, the Plaintiff did not raise any objection to it at the time of meeting, when he might have done so, and he has substantially waived that irregularity, so that it is not now open to him to contest it. Besides, the fortnight's notice might be taken to include the day on which the notice was issued. As to the majority of two-thirds, if, as was the case, two-thirds of those who actually voted were in favour of expelling the Plaintiff, that is sufficient.

Those objections, therefore, fail, and, there being no ground for charging the committee with acting arbitrarily in the matter, the Plaintiff is not entitled to the relief which is asked.

JESSEL, M.R.:—

If I have any difficulty in connection with this case it does not consist in the slightest hesitation as to what I ought to do, but in bringing myself to believe that with such clear rules before them—rules framed by persons of the same social position and

(1) 11 Ch. D. 353.

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knowledge as themselves—the committee of the *Beefsteak Club* could have imagined that they were following the directions given in those rules by acting as they have done.

The objections to the course they have taken are numerous. Of all the club cases which have been brought before me, I do not remember one in which the objections were so numerous as in the present instance; and I have come to the conclusion that every one of the objections taken against the action of the committee is well founded.

There is a rule of the club expressed in these terms: "In case the conduct of any member, either in or out of the club, shall, in the opinion of the committee, after inquiry, be injurious to the welfare and interests of the club, the committee shall call upon him to resign." If the member refused to do so, something else was to happen. It is a very serious thing for the committee of a club to call upon a member to resign in consequence of misconduct, for that is what it amounts to; and therefore the rule to which I refer is guarded by the words "after inquiry." The committee are not to form an opinion until "after inquiry." What does that mean? What kind of inquiry is intended? The words do not mean that they are simply to take up a newspaper, see in it that Mr. *A. B.* has written a letter, or has been brought up at a police-court for drunkenness, and then expel him. If the committee of a club acted in that way they might, in the latter case, expel the wrong man, for a person charged at a police-court with drunkenness might not give his own name, but the name of some friend or enemy. What the rule which I have quoted means is, that there shall be a fair inquiry into the truth of the alleged facts; and I am only astonished that any body of English gentlemen, who, if they are supposed to be distinguished for one thing more than another, are generally distinguished for their good common sense, should imagine that any other inquiry was intended.

What ought the committee of a club to do when the conduct of one of its members has been impugned? They ought to see what that conduct has been, and what excuse or reason can be given by the member for it; and they ought to give notice to that member that his conduct is about to be inquired into, and afford

him an opportunity of stating his case to them. What has been done in this case? The committee had brought before them a letter complaining of the conduct of a certain member towards another member as being injurious to the interests of the club; and they had also before them a newspaper, of which Mr. *Labouchere* is the proprietor, and which contained a letter, as to the terms of which it is not for me to express an opinion. I am not by any means disposed to say that those terms might not have been properly condemned and properly censured by the committee. Nothing which falls from me will in any way impugn, in that respect, the *bona fides* or the sound judgment of the body of gentlemen to whom I am alluding; but they did not tell Mr. *Labouchere* that his conduct was to be brought before them; and though they adjourned their meeting to a future day, and sent him a communication in the meantime, they did not inform him that his conduct was to be investigated at the adjourned meeting, and that it would then be considered whether he ought to be turned out of the club. Nothing of the sort. They wrote him a letter stating that his own letter of accusation of the 4th of November was duly received, and that it was resolved to hold a special meeting to consider the matter. What matter? The matter on the 4th instant was Mr. *Labouchere's* charge against Mr. *Lawson*. Meanwhile Mr. *Labouchere* was informed that he was not to make any personal attack upon a member of the club in any publication. That came to this, "You have brought a charge against Mr. *Lawson*, which is under investigation by the committee. In the meantime you are not to attack Mr. *Lawson*." This was intelligible, and, I should say, quite right. But there was not a syllable to the effect that the committee were going to consider Mr. *Labouchere's* own conduct, or to censure him in any way. No evidence was taken, and I am even now unable to see what the exact nature of the charge was against Mr. *Labouchere*. Three charges have been suggested. There was the conduct of Mr. *Labouchere* in connection with the alleged assault upon him; there was his conduct in writing the letter to Mr. *Lawson;* and there was his conduct in publishing that letter in *Truth;* but I am quite in the dark as to whether one charge was made singly, whether two were made, or whether all three were made and

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considered proved to the satisfaction of the committee. Of inquiry there did not appear to have been any of any kind or description; and it appears to me that the committee were not justified in acting as they have done.

In a case where a decision depended upon their opinion—in other words, upon their judgment—it was most important that the materials on which that judgment was formed should be accurately ascertained; and, of course, that could only be done by a proper investigation, by giving due notice to the accused, and by taking—I do not say legal evidence, or that evidence not strictly legal might not be admissible—but by taking evidence on the question of fact before them, and satisfying themselves as to the truth. They could then form their opinion. That was not done in the present case; and, in my view, the committee have not followed in substance their own rule at all. The judgment of a committee, with the facts of a case fully before them, might be right or it might be wrong. With that the Court has nothing to do. If, having given the accused fair notice, and made due inquiry, the committee came to the conclusion that the conduct of one of the members of the club was injurious to its welfare and interests, no judicial tribunal could interfere with any consequences which might arise from an opinion thus fairly formed.

The next point I have to consider is this: I find it provided that in the event of a member refusing to resign, as Mr. *Labouchere* did, it should be competent, by the votes of two-thirds of those present at a general meeting, to expel him; and that the committee should at any time have power to call a general meeting on giving a fortnight's notice, either at the request of five members of the club or upon their own responsibility.

In the present instance a meeting of the committee was held on the night of the 31st of October, and concluded on the morning of the 1st of November. That meeting decided to proceed in a very proper way, both by posting a notice in the coffee-room of the club, and by sending a circular to each of the members. So far as I am aware there is no common law for clubs as to the mode in which notices should be issued; and where no rule prescribes a mode, it is within the general functions of a committee of a club to say how notices should be given on each particular occasion.

Some matters connected with a club concern only those who habitually use it; and, in connection with these matters, the posting of a notice in the coffee-room or library is a very sensible plan to follow. But more important matters sometimes arose—matters relating, perhaps, to some organic change—matters connected with the general mode of conducting the club—matters connected with the conduct of a particular member; and, in such cases, it is only right to give notice by circular to those who do not habitually or daily use the club that these matters are coming on for consideration, in order that they may attend and take part in the discussion. When the latter course was adopted, the committee were bound to give a fortnight's notice. In this case the notice was for the 14th of November. If it were posted on the 1st of November, that would not be a fortnight's notice, and it was posted on the 1st of November. The secretary said that because the *Beefsteak Club* opened at one o'clock in the afternoon and did not close until three next morning, he considered that posting on that next morning was equivalent to posting on the previous day. I have nothing to do with what the secretary considered; but it is not possible that he can make that out to be a fortnight's notice. A fortnight has a definite legal meaning; and, therefore, the secretary's notion of the club day cannot affect the question which the Court has to decide. The notice which was sent out was dated the 31st of October, but that was wrong. The 31st of October mentioned in the rules is not the 31st of October according to the club usage, but simply the 31st of October, 1879, which means according to the calendar; and that notice was not issued on the 31st of October, but on the 1st of November.

In the next place, the general meeting was not properly called. On the one hand, it has been said that Mr. *Labouchere* attended that meeting and entered into the discussion—that he did not protest against the meeting having been irregularly called, and that therefore he has no right now to complain; but, on the other hand, Mr. *Labouchere* said he did protest, though it does not appear what the protest was. Mr. *Labouchere* was not compelled to say what it was. A man might say, "I have a good defence upon the merits. I contend that I ought not to be expelled. Therefore, I am not going to run away by availing myself of a

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technical objection." He was entitled to say, "Though the meeting is irregularly called, I have such a good case on the merits that I should like to take your opinion." But he was not bound to tell the meeting that it was irregularly or improperly called.

As to the question of waiver, Mr. *Labouchere* could not waive liability; he was liable for his subscription until he had resigned or been expelled, and if he had not resigned or been expelled, the club could have sued him for his subscription on the ground that he had not been properly expelled. In my opinion, then, this objection is valid, and the meeting, having been irregularly called, had no power to expel Mr. *Labouchere*.

The rule of the club was to the effect that, in the event of a member refusing to resign, a general meeting of members should be called, at which it should be competent for two-thirds of "those present" to expel him. Now, Mr. *Labouchere* has stated that there were 117 persons present, of whom 115 voted, that he himself was present but did not vote, and that the number who voted for his expulsion was seventy-seven. It is clear, therefore, that if there were 117 persons present, seventy-seven were not two-thirds of the number. The expulsion was, therefore, irregularly carried.

When a resolution is put to a meeting, the persons present may take one of three courses. They may vote for or against it, or, not wishing to express a positive opinion on the question, refrain from voting at all. This being so, those who do not vote may, by not doing so, turn the scale in favour of the accused member of the club. It was, therefore, the duty of the secretary, or scrutineer, to ascertain, first, how many persons were present when the question was put, and, secondly, how many of those present had voted for the resolution; but no such course has been adopted in this instance. It appears to me, then, that this also is a fatal objection. I have had some experience of clubs, and I am aware that when a committee has once expressed an opinion, there is a great tendency on the part of the club generally to support that opinion, simply because it is the opinion of the committee. That is not unnatural, because the committee are the governing body of the club, and usually its most active and prominent members; and a general meeting of members, as-

suming that the committee have made due inquiry, would consider their opinion entitled to great weight. But in this case the manner in which the question was put by the chairman was in itself a mistake. He ought to have put it thus:—Whether the meeting thought the conduct of Mr. *Labouchere* could properly be held by the committee to be injurious to the welfare and the interests of the club. But unfortunately he has not put the question in the right way. He ought not to have put it as a personal matter between the committee and Mr. *Labouchere*, but between the club and Mr. *Labouchere*, as to whether the opinion of the committee was well founded that the conduct of Mr. *Labouchere* had been injurious to the welfare and interests of the club. That being so, it appears to me that I ought to make an order in the Plaintiff's favour.

The Defendants' counsel having consented that the motion should be treated as the trial of the action, His Lordship made a perpetual decree restraining the Defendants from interfering with the enjoyment by the Plaintiff, as a member of the club, of the use and benefit of the club.

Solicitors: *Lewis & Lewis; Bennett, Dawson, & Bennett.*

In re ROSSITER.
ROSSITER *v.* ROSSITER.

[1879 R. 159.]

Locke King's Act (17 & 18 *Vict. c.* 113) *and Amendment Act* (30 & 31 *Vict. c.* 69)—*Will—General Direction to pay Debts—Mortgage Debt—"Exoneration."*

A testator by his will, dated in 1877, directed his executors "to pay all my just debts, funeral and testamentary expenses, out of my personal estate in exoneration of my real estate":—

Held, that a debt due from the testator at the time of his death on a mortgage of part of his real estate must be borne primarily by the mortgaged estate.

JAMES ROSSITER, by his will, dated in 1877, directed his executors "to pay all my just debts, funeral and testamentary

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expenses, out of my personal estate in exoneration of my real estate:" and, subject thereto, he bequeathed all moneys due to him on mortgage or otherwise, and all other his personal estate, to his wife absolutely; and he devised all his real estate to trustees in trust for his wife during her life, and after her death, to sell the same, and stand possessed of the proceeds upon trust for all his children who should be living at the death of his said wife in equal shares.

The testator died in February, 1879, leaving several children, of whom the Plaintiff was the eldest.

The testator shortly before his death, and some time after making his will, deposited the title-deeds relating to a freehold house belonging to him with a bank as security for an overdrawn account.

At the time of his death a sum of about £700 was due to the bank on the account. The testator died possessed of other real estate besides the property so mortgaged.

The question was whether the mortgaged property or the personal estate was primarily liable to the payment of the debt.

The question was raised by an action by the testator's eldest son against the widow, who was also surviving trustee of the will, for administration, if necessary for the determination of the question: and the action now came on upon a motion by the Plaintiff under Rules of Court, 1875, Order XL., rule 11.

Whitehorne, for the Plaintiff, contended that the testator's direction that his debts should be paid out of his personal estate "in exoneration of" his real estate must be held to have reference to the mortgage debt which was in fact charged on real estate, and that, therefore, such direction constituted a sufficient "declaration of intention" that the mortgaged estate should not primarily bear the mortgage debt, so as to take the case out of *Locke King's Act*, 17 & 18 Vict. c. 113, and the *Amendment Act*, 30 & 31 Vict. c. 69. He referred to *In re Newmarch* (1); *Leonino* v. *Leonino* (2); *Nelson* v. *Page* (3); *Lewis* v. *Lewis* (4).

C. H. Turner, for the Defendant, was not called upon.

(1) 9 Ch. D. 12.
(2) 10 Ch. D. 460.
(3) Law Rep. 7 Eq. 25.
(4) Ibid. 13 Eq. 218.

JESSEL, M.R. :—

My view of the Act amending *Locke King's Act* is that it was intended to exactly meet these and similar expressions.

In considering what was the testator's intention in this case, it appears to me that he did not really know what was or was not primarily charged by law upon his real estate, because he directs his executors "to pay all my just debts, funeral and testamentary expenses, out of my personal estate in exoneration of my real estate." He imagined that his real estate, and not his personal estate, was primarily liable to the payment of his general debts, funeral and testamentary expenses. He did not know the law, that is all.

It is said that, in directing his real estate to be exonerated from his "debts," the testator necessarily means mortgage debts, as being debts charged by law primarily on real estate: but that cannot be so, because he uses the word "debts" in conjunction with "funeral and testamentary expenses," which are certainly not so charged.

This, then, is really nothing more than a general direction for payment of debts out of the personal estate, and therefore insufficient to exclude the operation of the rule in *Locke King's Act.*

Now the words of the *Amendment Act* are express. It says (s. 1) that "a general direction that the debts, or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate."

Where do we find here words "expressly referring" to the testator's mortgage debts? There certainly are none. Then why must the words used refer to mortgage debts "by necessary implication"? I can see no reason for it. The explanation is, simply, that the testator did not know the law. He evidently thought that not only his ordinary debts—such as debts on simple contract—but also his funeral and testamentary expenses were primarily charged on his real estate, and he therefore gives this

M. R.
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In re ROSSITER. ROSSITER *v.* ROSSITER.

general direction. But the Act says that such a direction is not of itself a sufficient declaration of intention to exonerate the mortgaged estate. Why should I make a difference because the testator did not know the law? In my opinion there is nothing here referring by necessary implication to any debt charged by way of mortgage on the real estate.

I therefore decide that there is no sufficient declaration of intention here to take the case out of *Locke King's Act*, and accordingly that the mortgaged estate must primarily bear the mortgage debt.

Solicitor: *G. Reader*, agent for *T. W. Rossiter, Cheltenham*.

SAXTON *v.* SAXTON.

V.-C. M.
1879
Dec. 15.

[1879 S. 174.]

Wills Act, ss. 23, 24—*Bequest of Leasehold—Subsequent Purchase of the Fee.*

A testator gave to his wife all his term and interest in the leasehold house at *B.*, in which he then resided, for her absolute use and benefit, subject to the payment of the ground rent and performance of the covenants affecting the same. After the date of his will the testator purchased the freehold of the house at *B.*, which was conveyed to him in fee simple:—

Held, that the house passed to the testator's widow, under the specific devise contained in the will, for an estate in fee simple.

SPECIAL CASE.

The will of *William Waring Saxton*, dated the 28th of April, 1876, commenced with the following clause:—

"I give, devise, and bequeath unto my dear wife *Emily* all my term and interest in the leasehold dwelling-house and premises known as No. 1, *Berkeley Gardens*, *Kensington*, in which I now reside, for her own absolute use and benefit, subject to the payment of the ground rent and performance of the covenants affecting the same, but free from any claim or incumbrance (if any) created by me."

The testator, at the date of his will, was in possession and occupation of the messuage and premises mentioned in his will, and known as No. 1, *Berkeley Gardens*, under a lease for the residue of a term of ninety-four years from the 24th of June, 1859, at a yearly ground rent of £10, and subject to the performance of the usual covenants.

Subsequently to the date of his will the testator contracted for the purchase of the freehold of inheritance of and in the said messuage and premises, and by an indenture dated the 11th of July, 1877, the same messuage and premises were, in consideration of £280, conveyed unto and to the use of the testator, his heirs and assigns, for ever, and the testator was therefore at the time of his decease entitled to the said messuage and premises for an estate of inheritance in fee simple. The said conveyance contained no words whereby the lease was expressly merged in the

V.-C. M. 1879 SAXTON v. SAXTON.

freehold of inheritance of the messuage and premises. The annual value of the property was about £100.

The questions submitted for the opinion of the Court were,

1. Whether the messuage and premises, No. 1, *Berkeley Gardens*, passed to the Plaintiff (the widow of the testator) under the specific devise contained in the will, and if so, for what estate or interest?

2. Whether the costs of and incidental to this special case ought to be borne by the testator's general personal estate, or how otherwise?

Glasse, Q.C., and *Terrell*, for the Plaintiff, the widow of the testator:—

The question raised by this special case is, whether the legacy given by the testator to his wife, which consisted of his leasehold interest in the house where he then resided was adeemed by his subsequent purchase of the freehold. The only authority which can be cited in favour of the Defendant's contention is the case of *Emuss* v. *Smith* (1), but that decision was questioned by Lord *St. Leonards* (2), and was not followed in several other cases: *Struthers* v. *Struthers* (3), *Cox* v. *Bennett* (4), *Miles* v. *Miles* (5), and *Wedgwood* v. *Denton* (6). The 24th section of the *Wills Act* says that the will shall speak from the death of the testator, unless a contrary intention shall be expressed. In this case there is no suggestion of a contrary intention, since it is manifest that the testator intended his wife to have the house for whatever interest he had in it.

Higgins, Q.C., and *Levitt*, for the Defendants, the children of the testator:—

The case of *Emuss* v. *Smith* is entitled to considerable weight, since it appears that the parties were represented by very eminent counsel, who would not have allowed the case to pass without substantial argument; and that case is a distinct authority in our favour. We say that a contrary intention is expressed in this will sufficient to take it out of the 24th section of the *Wills Act*, for the

(1) 2 De G. & Sm. 722.
(2) Real Property Statutes, p. 365.
(3) 5 W. R. 809.
(4) Law Rep. 6 Eq. 422.
(5) Ibid. 1 Eq. 462.
(6) Ibid. 12 Eq. 290.

testator has said, I give all my term and interest in the leasehold, which means all "the term and interest I now have," and that brings the case within *Cole* v. *Scott* (1), where it was decided that the word "now" clearly alluded to the period at which the testator was making his will, and that he had thereby indicated a contrary intention.

[MALINS, V.C.:—I never could follow the case of *Cole* v. *Scott*. It is opposed to *Doe* v. *Walker* (2).]

No doubt at first sight the cases of *Struthers* v. *Struthers* (3) and *Cox* v. *Bennett* (4) are opposed to *Emuss* v. *Smith* (5), but it is remarkable that the latter decision was never referred to in either of those cases by the learned Judges who decided them. It was cited in *Cox* v. *Bennett*, but not in *Struthers* v. *Struthers*. Those cases rested entirely upon the construction of the particular words used in the wills.

[They also cited *Moor* v. *Raisbeck* (6), *Goodlad* v. *Burnett* (7), and *Hawkins* on Wills (8), citing *Hutchinson* v. *Barron* (9).]

MALINS, V.C.:—

It is clear to my mind that the object of the testator was to give to his wife all the interest he had in the house in *Berkeley Gardens*, which was in fact a lease for the residue of a term of ninety-four years, subject to a ground rent of £10 a year. After the execution of his will he purchased the freehold interest, or, in other words, he bought up the ground rent, so that at the time of his death, the leasehold being merged in the freehold, his interest was a freehold interest. The question then is, whether the interest which the testator gave to his wife was adeemed, or whether, under the 23rd section of the *Wills Act*, the widow was entitled to the whole interest. The words of the 23rd section of the Act are clear and free from doubt. "And be it enacted that no conveyance or other act made or done subsequently to the

(1) 1 Mac. & G. 518.
(2) 12 M. & W. 591.
(3) 5 W. R. 809.
(4) Law Rep. 6 Eq. 422.
(5) 2 De G. & Sm. 722.
(6) 12 Sim. 123.
(7) 1 K. & J. 341.
(8) Pages 20, 21.
(9) 9 W. R. 538.

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execution of a will of or relating to any real or personal estate therein comprised . . . shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death." The question now raised has been before the Court on previous occasions. The first decision is in *Emuss* v. *Smith* (1), where a testator, by a will dated before, and republished by a codicil after, the *Wills Act*, devised all his freehold estate at *B.*, which he purchased of *C.* It appeared that there was a small piece of land purchased with the estate from *C.*, and always held with and annexed to it, which was leasehold; and after executing the codicil the testator purchased the fee of that small piece of land, whereby the leasehold was merged, and it was held that the after-acquired fee did not pass by the codicil. I do not think that that case could have been fully argued, and there certainly are other authorities opposed to that decision. In the case now before me, the subject-matter of the devise is the house—the place in which he resided, and where he was desirous that his wife should continue to reside. It seems to be admitted that if he had given the house in *Berkeley Gardens* for all the interest he had in it, then the freehold would have passed; but he gave all the interest he had in the house, which it is said was a gift of the leasehold. I cannot but think that in using the expression he has used, it is precisely the same as saying, my house for all the interest I have in it. To my mind it is simply a different collocation of the words, but meaning the same thing. At the time of making his will he had a leasehold interest in the house, and afterwards he purchased the freehold; and it is argued that as he had no leasehold interest in the house, which was the interest he possessed at the time of making his will, the legacy was adeemed. Now, there are authorities which warrant me in coming to a decision contrary to that of *Emuss* v. *Smith*. There is the case of *Struthers* v. *Struthers* (2), where the testator gave certain leaseholds for all the residue of the term for which the same should be held by him at his death, and after making his will he acquired the fee, and it was held that such fee passed under the 24th section of the *Wills Act*. There Vice-Chancellor *Kindersley*, who

(1) 2 De G. & Sm. 722. (2) 5 W. R. 809.

fully considered the question, was of opinion that the words were used to express the whole extent of the property he might leave at his death, not anticipating that he should then be entitled to any greater interest. The will therefore operated on the fee simple subsequently acquired.

The question came before the Court again in the case of *Cox* v. *Bennett* (1). There the point arose in this way: the testatrix bequeathed to trustees certain house property, which he described as leasehold, upon trust for the benefit of his wife for life, and after her death as she should appoint generally, and he also made a residuary devise and bequest of realty and personalty. After the date of his will the testator purchased the reversion of the leaseholds, which he had given for the benefit of his wife, and took a conveyance to himself in fee. The question was, whether the freehold interest passed to the trustees in trust for his wife, and Vice-Chancellor *Giffard* said, "I think this is one of those cases which it was intended that the *Wills Act* should operate upon. The clause in the statute says that the will is to pass such estate or interest in such real or personal estate as the testator shall have power to dispose of at his death; and there is nothing in the will to confine its operation to the interest which the testator had at the date of the will. The mere method which the testator adopts of describing his property is not equivalent to saying, 'I give the leasehold interest' and nothing else. There is, I think, in this description abundant to carry the freehold interest in the property."

Then the same thing was in effect decided in *Miles* v. *Miles* (2). The words of the specific devise were, "my messuage, partly freehold and partly leasehold, No. 3, *Cannon Street*," and there was a residuary devise upon trust for sale. The testator, subsequently to his will, purchased the reversion of the leasehold part of the messuage, and it was held that the whole of his interest in the messuage passed by the specific devise.

And there is another case of *Wedgwood* v. *Denton* (3). There a testatrix gave her house in *Liverpool*, held under the corporation, for the life of *T. Kay* and twenty-one years after his death," and

(1) Law Rep. 6 Eq. 422. (2) Law Rep. 1 Eq. 462.
(3) Law Rep. 12 Eq. 290.

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upon *T. Kay* dying in her lifetime, and after the execution of the will, she surrendered the twenty-one years' lease to the corporation and took a new lease for seventy-five years. It was there held that, notwithstanding the surrender of the original lease, the gift was valid for at least the period of twenty-one years from the death of *T. Kay*. Beyond that period it was not necessary to decide upon the construction of the trusts of the will.

There is nothing more clear than that this testator intended to give the house as a provision for his wife, and he intended by the words he used to give any interest he might have in that house. Very likely he thought it would be inconvenient for her to have this ground rent to pay, and so he purchased it to save her trouble. There can be no doubt about the intention, nor have I any doubt about the meaning of the *Wills Act*. The 24th section made the will to speak from the death, and the effect was to pass the house for whatever interest he had in it. Therefore, I answer the first question in the affirmative, that the house passed to the Plaintiff under the specific devise contained in the will of the testator for an estate in fee simple; and the costs will be borne by the general personal estate.

Solicitors for all parties: *Saxton & Son.*

In re ECCLESHILL LOCAL BOARD.

V.-C. B.
1879
Dec. 17.

[1879 E. 109.]

Compulsory Purchase—Assessment of Purchase-money and Compensation by Jury—Interest, from what Period payable.

The interest of landowners who were entitled in fee simple subject to certain tenancies was assessed by a jury under the *Lands Clauses Act*:—

Held, that interest at 4 per cent. was payable from the date of the verdict, although *de facto* possession of the land was not obtained until the expiration, at a subsequent period, of the tenancies subject to which the land was held.

ADJOURNED SUMMONS under the *Vendors and Purchasers Act*, 1874, on an application by the vendors of lands at *Eccleshill*, in the *West Riding of York*, for a declaration that interest at the rate of 5 per cent. per annum was payable by the *Eccleshill* Local Board, the purchasers, upon £14,000, the sum assessed by verdict of a special jury for purchase-money and compensation, from the 18th of April, 1878, the date of the verdict, or from such earlier date as the hereditaments were taken possession of by the board.

On the 9th of June, 1877, the *Eccleshill* Local Board, under the powers of the *Public Health Act*, 1875, served the applicants, the trustees under the will of Colonel *Stanhope*, with notice to treat for certain lands, subject to yearly tenancies. The trustees stated that their interest as trustees was the fee simple.

Subsequently to service of the notice to treat, the applicants desiring to have the matter settled by arbitration, arbitrators and an umpire were appointed; but after considerable negotiation and delay the arbitration went off, and ultimately, in March, 1878, a jury was summoned under the *Lands Clauses Act*, 1845, sect. 50. On the 18th of April, 1878, the sum of £14,000 was awarded, on a trial before the under-sheriff and a special jury, for purchase-money and compensation for severance, and in respect of damage claimed as compensation for the proximity of an intended sewage farm to a mansion on the estate.

In July, 1877, pending the negotiations for reference to arbitration, the vendors had given all their tenants notices to quit, for the purpose of readjusting the holdings, in the event of a sale of

V.-C. B. 1879 — *In re* Eccleshill Local Board.

the property pursuant to the directions contained in Colonel *Stanhope's* will.

Upon the expiration of these notices in February, 1878, the land was relet to the former tenants. A portion only of the property having been sold in June, 1878, and another sale being in contemplation for 1879, notices to quit expiring in February and May, 1879, were again given to the tenants. Up to these periods the rents had been received by the vendors (the applicants).

Some question arose as to the exact time when possession was taken by the Local Board, it being alleged by the vendors that the Local Board had actually entered upon the land for the purposes of their works in July or August, 1877. This was denied by the Local Board, who explained the alleged entry as having been merely temporary for the purpose of hauling materials, and that what was done by the contractors on behalf of the Local Board was done by arrangement with the tenants, to whom money was paid for the temporary accommodation, and was in no sense an actual taking possession, which did not, as they alleged, take place until the tenants, on the expiration in 1879 of the notices to quit, gave up their holdings.

In July, 1879, the draft conveyance was finally approved, and ready for execution.

The question raised by the present summons was, from what period interest on the purchase and compensation money was payable by the Local Board. The applicants claimed interest from the 18th of April, 1878 (the date of the verdict), if not from July, 1877, when, it was alleged, possession for the purpose of executing certain permanent works on the land was taken by the Local Board; while the Local Board insisted that they were not bound to pay interest from any period prior to the 2nd of February, 1879, and the 13th of May, 1879, the dates when the land and buildings respectively were given up to them.

Hemming, Q.C., and *Ingle Joyce*, for the vendors, contended that, apart from the disputed entry in 1877, interest was payable at any rate not merely from the time when the Local Board *de facto* acquired possession of the land from the tenants, but from the date of the verdict assessing the amount of compensation which

entitled them to possession of the trustees' interest or receipt of rents.

Sir *H. Jackson*, Q.C., and *Eyre*, for the Local Board, contended that interest did not begin to run until, by the expiration of the tenancies in 1879, *de facto* possession of the soil was obtained by the Local Board. What was agreed to be sold was the reversion which fell in upon the expiration of the interests of the tenants in the land comprised in the notice to treat, and until the Local Board were enabled to exercise their statutory rights by obtaining possession of the land, they were not owners so as to be liable to pay interest to the vendors. The time of taking possession, and not the time when the price was ascertained by the verdict of the jury, is the period from which interest is payable: *Rhys* v. *Dare Valley Railway Company* (1). The verdict of a jury assessing compensation is not a judgment which carries interest in the same manner as a judgment debt due by order of a Court of Record: *Lloyd* on Compensation (2); and as the *Lands Clauses Consolidation Act*, sect. 50, does not contain any provision as to interest, the question must be governed by the ordinary rule in cases between vendor and purchaser where the contract is silent as to interest. Adopting that analogy, interest does not begin until possession has been taken or the title accepted.

BACON, V.C.:—

The argument in this case has been most discursive, the evidence extremely voluminous and, in my opinion, very much beside the single question between the parties, which is, whether interest should be paid, and from what time it should be paid. That is the only thing to be considered. The vendors, having no present possession of the property as owners except as landlords, were called upon under the powers of the Act of Parliament to transfer their rights to the present purchasers, the Local Board. Proceedings were taken for that purpose. Ultimately, notice to treat having been given, a claim having been sent in and a notion of arbitration having been entertained and fallen through, the matter culminates into issuing a warrant to the sheriff and

(1) Law Rep. 19 Eq. 93. (2) Page 167.

V.-C. B. 1879 *In re* Eccleshill Local Board.

summoning a jury to ascertain the value of that interest which had been included in the notice to treat, and defined by the claim which the owners of the property had sent in. The claim was that the trustees, the vendors, being the owners subject to certain tenancies, proposed to sell, being compelled to do so by the Act, to the Local Board and asked from them £30,000. What was that which was to be sold? Nothing of which actual possession could be taken. It was not in the power of the vendors to give possession of the land, for possession was already in their tenants, and they said so. In that sense possession was never taken, but possession was taken, and the verdict pronounced, of all that the vendors had to sell. From that moment, call it contract or what you will, as the result of the operation of the plain Act of Parliament, from the time that the verdict was delivered and judgment pronounced by the sheriff, the vendors ceased to be owners of the interest which they before had, and the purchasers became the owners of that interest just as the vendors had had it up to that time; and they became, in my opinion, plainly debtors from that moment to the vendors of the whole amount which had been assessed. It was not paid until a recent period, and it is, in my judgment, clear both in law and in reason, that, independently of the law of compensation according to the practice of this Court, in cases between vendor and purchaser, the applicants, the vendors, are entitled to receive their unpaid purchase-money with interest from the time when by the verdict of the jury the contract became complete, that is, from the 18th of April, 1878. That is the only question between these parties, because no possession was given by the vendors, who had no actual possession to give. They were compelled to part with the interest they had, that is, an interest subject to tenancies, and had no power to give any possession, and no possession was taken from them. Their position was in no way altered, nothing was taken from them, no act was done by them, nor by any possibility could any act be done to give possession, nor did the purchasers take from them anything like possession which it is said they did. Whether work was done on the land, and with the consent of the tenants, who had power to give consent, is, in my opinion, wholly indifferent. If anything could be made of that fact, which was so much insisted upon, that

permanent works were done at a certain period, on which point the evidence is most directly in conflict, it would not alter the question which is before me. The permanent works being done, if the vendors could make any claim in respect of that, they have made it. They have had it assessed by the jury, and they have claimed all the damages which they could sustain, had sustained, or might sustain, by reason of the works of the Local Board. The jury have taken all that into consideration, and have given them not only the value of their interest, but as compensation for all damages, whether by severance, or by works, or by or for any other damage which could by possibility have been committed, they have given them the full amount to which they are entitled; and to more than that £14,000 it is impossible to say they had, or, now that verdict has been pronounced, ever could have had any claim. In my opinion, therefore, the right to the unpaid purchase-money is clear from that day when the amount for the first time was conclusively ascertained. Interest on that purchase-money is payable to the persons to whom that money belongs. If during that period the vendors have exercised such right as they have under their leases and have received any rents, the amount of those rents, which, as I understand, is not in dispute, will be deducted from the amount of interest payable. The rights of the parties were conclusively settled by the verdict pronounced. Their respective rights by law were then distinctly and definitely ascertained; the relation of debtor and creditor was created between them, and if the money was not then paid, as it might have been, the owner of the money is entitled to interest from the purchasers, who have kept the money. In my judgment the vendors are entitled, from the 18th of April, 1878, the day on which the verdict was given, to interest at 4 per cent. on the purchase-money. I make no order as to costs in favour of either party.

Solicitors: *Gregory, Rowcliffes, & Rawle,* agents for *Thorley & Hampson, Manchester; Layton & Jaques,* agents for *Watson & Dickons, Bradford.*

V.-C. B.
1879
Dec. 18.

JOHNS *v.* JAMES.

[1877 J. 98.]

Practice—Discovery—Interrogatories—Rules of Court, 1875, *Order* XXXI., *rr.* 5, 8, 19.

20 Ch D 522, 525

In an action against two Defendants by a Plaintiff claiming to be a creditor of a late partner of one of the Defendants, for all of whose creditors it was alleged the Defendants were trustees under a deed of assignment of certain property, the defence in substance was, that the firm were never indebted to the Plaintiff, that the deed contained no trust for the payment of any debt of the late partner, but was an assignment by way of mortgage to secure repayment to the Defendants of a sum advanced by them to pay such of the late partner's debts as they should in their discretion think fit, that neither the late partner nor the Defendants ever recognised the Plaintiff as a creditor, that the Plaintiff was not a party nor privy to the deed, and that he was not aware of its existence until the bankruptcy of the late partner. The defence admitted a certain alleged interview, but denied the alleged purport of the conversation thereat.

Plaintiff stated that he had seen "some accounts" which shewed that the Defendants had not properly discharged the debts.

Interrogatories filed by the Defendants calling upon the Plaintiff to set forth how the firm became collectively liable to the Plaintiff, when communication of the fact of the execution of the deed by the Defendants to the Plaintiff was made, and what accounts they were which the Plaintiff had seen, were allowed.

An interrogatory as to the persons in whose presence communication of the above fact was made, having been withdrawn;

Eade v. *Jacobs* (1) observed upon.

An interrogatory whether it was the fact that certain allegations made in the statement of claim were true, and whether it was not the fact that certain statements in the defence were true, was disallowed.

THIS was a summons on behalf of the Defendants for an order directing the Plaintiff to make a further and better answer to interrogatories.

The Plaintiff was the Rev. *William Johns*, claiming to be a creditor of *William Meyrick*, who was in partnership with the Defendant *Sydney Gedge* prior to the 13th of June, 1871, when the partnership was dissolved.

The amended statement of claim alleged that prior to the 13th of June, 1871, the Plaintiff had advanced to *Meyrick* sums

(1) 3 Ex. D. 335.

amounting to about £3500, for which *Meyrick* was personally liable to him, "and the said firm was also collectively liable to him for the same sum;" that *Meyrick* being in difficulties agreed that the Defendants *James James* and *S. Gedge* should borrow a sum of £5000 wherewith to pay his debts, or some of them, and that by a deed of the 22nd of June, 1871, property of *Meyrick* was mortgaged to the Defendants for £5000 and interest.

The amended statement then went on to allege as follows:—

"The execution of the before-mentioned deeds was, shortly after the execution thereof, communicated to the Plaintiff and to other creditors of the said *William Meyrick* by him and by the Defendants."

It then went on to allege that the Plaintiff called at the office of Messrs. *Gedge* and his partner, and proceeded to narrate a conversation.

Then that in May, 1874, *Meyrick* was declared bankrupt at the instance of a client of the Defendant *Gedge*.

Then that the Defendants, purporting to act under the deed, had taken possession of the whole of *Meyrick's* estate, but had not paid the Plaintiff any portion of his debt, nor rendered him any account: and that the Plaintiff had "seen some accounts purporting to be a partial account of the dealings of the Defendants with their trust property and effects," which, even if correct, shewed that the Defendants had not fairly and properly discharged the debts of *Meyrick*.

The claim was for proper accounts; that the estate comprised in the deed might be properly administered by the Court for the benefit of the Plaintiff and all other creditors of *Meyrick;* and other relief.

A demurrer by the Defendants was, at a former stage of the action, allowed (1); and the Plaintiff had obtained leave to amend.

The Defendants, by their amended statement of defence, denied that the firm were "collectively or in any way" indebted to the Plaintiff. They said it was agreed that £5000 should be borrowed by *Meyrick* from them for the purpose of discharging such of *Meyrick's* debts as they in their discretion should think fit; that the

(1) See the report 8 Ch. D. 744.

V.-C. B. 1879 JOHNS v. JAMES.

mortgage deed contained no trust for payment of the Plaintiff's debt, or any other debt due from *Meyrick*, that the Defendants never recognised the Plaintiff as a creditor of *Meyrick*, and in the exercise of their discretion decided that he was not a creditor, and that *Meyrick* never admitted nor believed the Plaintiff to be a creditor, although after a contest he had been admitted to prove as a creditor in the bankruptcy. They said that the Plaintiff was not party or privy to the deed, that neither *Meyrick* nor the Defendants ever gave him notice of the deed, and that the Plaintiff was not aware of its existence until after *Meyrick's* bankruptcy; and that it was never intended that the execution should be communicated to *Meyrick's* creditors. They admitted the alleged interview, but denied the purport of the conversation as alleged by the Plaintiff; and further stated that accounts of their dealings with *Meyrick's* estate had been furnished to the trustee in bankruptcy of the estate, and had been inspected by the Plaintiff, and alleged that such accounts fully and correctly represented such dealings.

The Defendants thereupon delivered interrogatories to the Plaintiff, which were in substance as follows:—1. How did the firm become "collectively liable" to the Plaintiff? Set forth short particulars of the contracts, if any. 2. When, how, and where was the execution of the deeds communicated to the Plaintiff, 1, by *Meyrick*, and, 2, by the Defendants? If in writing set forth the contents, and by whom and when written; if verbally, set forth in whose presence such conversation took place. To what creditors of *Meyrick*, other than the Plaintiff, was it communicated? 3. Give the date of the interview alleged in the statement of claim, and state who were present. Is it the fact that allegations in the claim (specifying them) respecting this conversation are true, and if true, set forth the terms in which the alleged information was conveyed? Is it not the fact that certain other statements as to the conversation (specifying them) in the defence are true, and if true, set forth the terms? 4. Whether the Plaintiff did not institute the proceedings in bankruptcy against *Meyrick;* and 5. What were the accounts?

Plaintiff declined to answer the interrogatories (all but the fourth, which was answered, and no question upon it arose), on the

grounds that the discovery was not material to the Defendant's case; that it was part of the Plaintiff's case; and that the inquiries were an attempt to anticipate the Plaintiff's evidence at the trial; and contended that the discovery ought to be by cross-examination at the trial and not by interrogatory.

Romer, for the summons:—

The Plaintiff is bound to answer these interrogatories: *Saunders* v. *Jones* (1), except the inquiry as to the persons in whose presence the verbal communications were made. This I withdraw in deference to the authority of *Eade* v. *Jacobs* (2), though if the matter were of vital importance, it might be argued that a Judge of the Chancery Division is not bound by that decision, and in fact the Master of the Rolls has, in Chambers, held himself not bound by it. That the practice in the two Divisions is not identical, is evident from *Hancock* v. *Guerin* (3), where it was held that a Plaintiff in a Common Law Division cannot, generally, as he can in a Chancery Division, get discovery before a statement of defence is delivered.

Sheild, for the Plaintiff, opposed:—

As to the first interrogatory, the subject-matter is no part of the Defendant's case; the Defendant is not entitled to know how our case is to be established. As to the second, I admit that the Plaintiff must give the dates of the communications, but not the substance of the conversations. As to the names of the persons in whose presence the conversations were held, *Eade* v. *Jacobs* applies. As to the third, the fact of the Plaintiff calling upon and seeing the Defendant *Gedge* is admitted.

[BACON, V.C.:—An interview, but not in terms, the interview alleged, is admitted.]

As to this, I admit the date must be given. The interrogatory as to the truth and untruth of certain statements is merely directed to impeaching our credit, and this the Court holds to be irrelevant, and does not allow, the matter being one for the hearing: *Allhusen* v. *Labouchere* (4). Then as to the fifth inter-

(1) 7 Ch. D. 435.
(2) 3 Ex. D. 335.
(3) 4 Ex. D. 3.
(4) 3 Q. B. D. 654.

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rogatory, how is the Plaintiff to get these accounts? So far as they are matters of record, they are as much within the Defendant's reach as within the Plaintiff's. Except so far as the dates are concerned, the summons ought to be dismissed.

BACON, V.C.:—

I think these answers are insufficient.

20 Ch D 522 523

Take the first of them:—[His Lordship read the interrogatory, and continued:—] I think that should be answered. Why are the Defendants to be brought to the hearing, and then learn for the first time the facts which are alleged against them?

Turning to the second interrogatory, there is no allegation in the statement of claim as to when the communication was made to the Plaintiff. The allegation is, that "shortly after" the execution of the deeds, the fact of their execution was communicated. The Defendant is entitled to know from the Plaintiff when this was.

As to the persons in whose presence the conversations took place, Mr. *Romer* gives up the contention. In the presence of the decision in *Eade* v. *Jacobs* (1), I desire to say nothing more on this point. It has been removed from the case, and it has become unnecessary that I should decide it, but it is a matter which at another time and in another place must, I think, receive more attention than appears to have been yet bestowed upon it.

As to the interrogatory respecting the accounts, it appears that certain accounts have been filed in bankruptcy. The Plaintiff says he has seen "some accounts," but he does not say what. They may be the accounts which were filed in the bankruptcy, or they may be some others. The Defendants have a right to know what accounts are meant, in order that they may be able to meet the charge that such accounts "shew that the Defendants have not fairly and properly discharged the debts of *William Meyrick*." Which of the debts? In order to enable the Defendants to meet such a charge as this, the charge itself should be plain and distinct.

There is only one part of the third interrogatory to which I think exception must be allowed. I mean, as to whether certain allegations are true or false. These inquiries are like saying,

(1) 3 Ex. D. 335.

"Have you not told a falsehood in your statement of claim?" Such an inquiry as this is not, I think, the province of interrogatories. There is no reason why the Plaintiff should be put to answer any such inquiry. The interrogatories I have referred to must be struck out; the others must be answered. The costs will be costs in the cause.

V.-C. B. 1879 JOHNS v. JAMES.

Solicitor for Plaintiff: *G. B. B. Norman.*
Solicitor for Defendants: *C. F. Millett.*

LYON *v.* TWEDDELL.

V.-C. B. 1879 *Dec.* 18.

[1879 L. 142.]

Practice—Discovery—Interrogatories—Rules of Court, 1875, *Order* XXXI., *rr.* 5, 8, 19.

In an action for dissolution of partnership in the business of surgeons, Plaintiff alleged that the Defendant "for some time past and since from about" a certain date "so behaved and conducted himself towards the Plaintiff in the presence of . . . many of the patients of the partnership," as to make it impossible for the Plaintiff to carry on practice with him.

An interrogatory by the Defendant calling upon the Plaintiff to set forth the particulars and circumstances of the occasions on which the Defendant had so behaved and conducted himself, allowed.

An interrogatory as to the names of the persons in whose presence the Defendant had so behaved and conducted himself, disallowed.

An interrogatory calling upon the Plaintiff to set forth accounts held to be premature, and disallowed.

16 C.L.D. 94 17 Ch.D. 529 20 Ch.D. 323.

THIS was a summons on behalf of the Defendant that the Plaintiff might be ordered to answer interrogatories.

The Plaintiff *Walter Lyon*, and the Defendant *George Tweddell*, were in partnership as surgeons; and the action was for dissolution. The statement of claim alleged amongst other things as follows:—

"The Defendant has for some time past, and since from about the month of January, 1878, so behaved and conducted himself towards the Plaintiff in the presence, as well of the assistant employed in the partnership practice, as of many of the patients of the partnership, and on other occasions, as to make it impossible

S.C. on appeal from judgment at trial 17 Ch.D. 529.

V.-C. B. 1879 LYON v. TWEDDELL.

for the Plaintiff any longer, with a due regard to his own self-respect as a professional man, to continue to carry on practice with the Defendant; and such behaviour and conduct" . . . has amounted to a breach of covenant, . . . "and has been and is calculated to lower, and has in fact lowered, the Plaintiff in the estimation and respect of the patients of the partnership." . . .

"Among other epithets applied by the Defendant to the Plaintiff, in the presence of the said assistant, or of patients, have been the terms," &c., (specifying them.)

The statement of defence traversed these allegations by denying the former of them and not admitting the latter. There was also a counter-claim, which was replied to.

Defendant delivered interrogatories which were in substance as follows:—1. Set forth the dates, particulars, and circumstances of all the instances and occasions since from about January, 1878, on which (as alleged) the Defendant so behaved and conducted himself (following the allegation) in the presence of the assistant, "or of any other and what person or persons or otherwise, so as to make it impossible," &c. Set forth how and in what manner the behaviour and conduct of the Defendant has in fact lowered the Plaintiff in the estimation and respect of the patients of the partnership, "or any and which of them."

2. Set forth the names and addresses of the persons in whose presence the Plaintiff alleges that the Defendant applied to the Plaintiff the several epithets mentioned and the particulars of the occasions on which it is alleged by the Plaintiff that the same were so applied.

3. Set forth an account of all moneys received by the Plaintiff in respect of the partnership business.

Plaintiff objected to answer the first interrogatory, on the ground that the particulars and circumstances were sufficiently stated in the statement of claim, and that the dates were not material except so far as they were stated. He objected to answer the second, as to names and addresses, by reason that the Defendant was not entitled to require the names and addresses of Plaintiff's witnesses, and as to particulars of occasions, for the same reason, and by reason also that the same were sufficiently stated. The third interrogatory was objected to on the ground

that the accounts were premature, and not necessary for the trial of the action.

Hemming, Q.C., and *James G. Wood*, for the summons:—

The first interrogatory is within *Saunders* v. *Jones* (1), even supposing *Eade* v. *Jacobs* (2) to be the law of the Court. As to the names of persons, it was held in *Eade* v. *Jacobs* that you are not at liberty to ask for the names of persons who are about to be witnesses. Whether this is the right practice, especially in the Chancery Division, may well be questioned. But in the present case the ruling does not apply, because the gravamen of the charge is that we abused the Plaintiff in the presence of patients, and we have a right to know everything which is necessary to make the charge precise, so that we may meet it quite apart from the question whether we could claim to be told what persons would be able to give evidence. It is not as witnesses that we ask to know the names of these persons, but as patients. This brings the case completely within *Saunders* v. *Jones*. When the names are necessary in order to frame the allegations, and are an elementary part of the facts charged, you may and you must ask for them. The inquiry for accounts is also covered by *Saunders* v. *Jones*.

Sir *H. Jackson*, Q.C., and *Caldecott*, for the Plaintiff:—

This practice of delivering interrogatories has sprung up under the Judicature Acts, because it has been held that you cannot have particulars of demand in a Chancery action, and so there must be interrogatories, but only that the Defendant may know the case that is to be made against him—not further. The Defendant is not entitled before trial to get the Plaintiff's evidence. The allegations in this statement are precise and particular; in *Saunders* v. *Jones* they were of the vaguest kind. The allegation is as to the conduct and behaviour of the Defendant in the action, not as to the conduct and behaviour of third persons; it is impossible that the Defendant can be taken by surprise.

As to the accounts, there is no pretence for calling for them now, when they must be taken under the decree.

(1) 7 Ch. D. 435. (2) 3 Ex. D. 335.

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Hemming, in reply, as to the second and third interrogatory:—

The object of asking for the account now was to meet the question of whether the premiums are to be repaid in full, or *pro ratâ* according to the acts of misconduct, if any, alleged and proved.

As to the names of the patients, they are a necessary part of the charge, in order to shew what sort of persons they were in whose estimation the Plaintiff's reputation is alleged to have been lowered.

BACON, V.C.:—

In my opinion there is no ground in the circumstances of this case, considering the practice of this Court, why the last interrogatory should have been delivered. What is it that is asked for but the most ordinary partnership account, in taking which the provisions of the partnership deed will be attended to? Any special circumstances unprovided for by the articles will be the subject of inquiry.

Then as to the first interrogatory, the charge is:—[His Lordship read the charge as to the Defendant's conduct and behaviour set out above, and continued:—] That is an allegation of facts. Is it unreasonable that the Defendant should have the proper means of meeting those allegations of fact? The principle of the Courts has been always the same, whether the Defendant calls for further and better particulars, or whether he files a cross-bill or a cross-action—the right is the right of an accused person to extract from his accuser what his charges are, and what the facts are upon which he intends to rely. I am not at all alarmed by the suggestion that this inquiry will be the prolonging of a litigation which, if left to take its natural course, and conducted upon proper principles, would soon have come to an end. It may be that such an inquiry will shorten the proceedings, and there is no doubt that there are some instances in which it has successfully done so.

Following, then, the useful decision in *Saunders* v. *Jones* (1), and in accordance with, and not in violation of, the decision in *Eade* v. *Jacobs* (2), I think the Defendant is entitled to an answer to the first interrogatory.

(1) 7 Ch. D. 435. (2) 3 Ex. D. 335.

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But I think the second interrogatory must be altered by striking out the "names and addresses of the persons in whose presence the Plaintiff alleges that the Defendant applied to the Plaintiff the several epithets," and so on; but the particulars of occasions must be given.

The third interrogatory must be disallowed.

I make no order as to the costs of this application now; the costs will be reserved to the hearing.

Solicitors for Plaintiff: *Shum, Crossman, Crossman, & Prichard,* agents for *Kidson, Son, & McKenzie, Sunderland.*

Solicitors for Defendant: *Rogerson & Ford,* agents for *F. Marshall, Durham.*

V.-C. H.
1879
Dec. 11.

MOGGRIDGE *v.* HALL.
LADY LLANOVER *v.* HOMFRAY.

[1870 L. 77.]

PHILLIPS *v.* LADY LLANOVER.

[1871 P. 58.]

Ancient Suit—Evidence taken de bene esse—Modern Suit for the same Purpose—Publication of ancient Evidence allowed.

19 Ch D 227.

In a suit instituted in 1815 for a declaration of title to mines and minerals witnesses were examined by commission *de bene esse* in that year. Nothing had been done in that suit since 1818.

In modern suits for, in effect, the same purpose the evidence had been closed and the suits were ready to be set down for hearing.

On motion in all the suits publication of the ancient evidence was allowed, and an order was made as in *Duke of Hamilton* v. *Meynal* (1).

THE bill, in which *Moggridge* and three others were Plaintiffs, was filed in March, 1815, on behalf of themselves and others, the owners of customary tenements held of the manor of *Abercarne*, against *Benjamin Hall* for a declaration of title to the mines and minerals thereunder.

In May, 1815, the Master of the Rolls, on the petition of the Plaintiffs, in which it was stated that the persons therein named, twelve in number, were very material witnesses in the cause, and that they were of the ages mentioned, the youngest at that time being sixty-seven years old, gave liberty for the appointment of commissioners by the Petitioners to examine those persons *de bene esse* as witnesses, saving just exceptions. The evidence was taken, but nothing more had, since 1818, been done in that suit.

The bill in which Lady *Llanover* and the two surviving trustees of the will of *Benjamin Hall* were Plaintiffs [1870 L. 77] was filed in June, 1870; and it prayed for a declaration that the trustees were entitled, as lords of the manor of *Abercarne*, to the mines and minerals under the *Troed Rhiw Gwair* estate; and for declarations of title against the Defendants, and for accounts and inquiries; an injunction and costs. There were many Defen-

(1) 2 Dick. 788; 2 Ves. Sen. 497.

dants other than the Defendant *Homfray* to that suit. The bill was amended in December, 1871. The answer of *J.* and *J. Phillips*, who were two of the Defendants, was filed in February, 1871.

The bill in which *J.* and *J. Phillips* were Plaintiffs was filed on behalf of themselves and all others the owners of the customary tenements held of the manor of *Abercarne*, in April, 1871, against Lady *Llanover* and the said two trustees, and it prayed that the Plaintiffs, as the owners of the said estate, and the owners of all other customary tenements within the manor, were entitled to the mines and minerals, &c., and to get and win and dispose and sell the minerals without license of the lord or lady thereof; for an injunction; and for a decree establishing and quieting the title of the Plaintiffs and the other owners; and the Plaintiffs asked that the suit might be deemed to be a supplemental suit to *Moggridge* v. *Hall*, and that they might have the same benefit of that suit and of the proceedings and evidence therein against the Defendants in like manner as the Plaintiffs in that suit could have had the same against the Defendant thereto, and that if necessary or proper this suit might be taken and deemed to be a cross-suit to the suit of *Lady Llanover* v. *Homfray;* and for costs. The original answer of the Defendants was filed in August, 1871. The bill was amended in July, 1872, and reamended in April, 1874. The answer to the reamended bill was filed in September, 1874, and replication was filed before the *Judicature Act* of 1875 came into operation. The evidence, it was stated, had been closed some months, and the causes were ready to be set down for hearing.

This was a motion intituled in the three suits that the depositions of the twelve witnesses examined in the first suit by virtue of the order of May, 1815, and retained in the custody of the Court, and now deposited at the Public Record Office, might be published, and that any of the parties in these causes might be at liberty to use such depositions on the hearing of these causes or either of them, saving all just exceptions, and without prejudice to any question as to the admissibility of such depositions, or any of them, as evidence.

W. Pearson, Q.C., and *Freeling*, for the motion:—

The question involved in these suits is whether the customary

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tenants of the manor are entitled to the coals and the minerals under the surface. The object now is to have publication of the depositions. The question of admissibility of the evidence may be kept open till the hearing, when it will be more easily disposed of. The authorities which support the application are, *Duke of Hamilton* v. *Meynal* (1), *Vane* v. *Vane* (2), and *Daniell's* Chancery Practice (3).

Kekewich, Q.C., and *Hornell*, for Lady *Llanover* and the trustees:—

The application is opposed on the ground that the suits have been going on for many years, replication having been filed in 1875, and the suits are ready to be set down for hearing, and further serious delay will be caused to the parties concerned by this attempt on the part of the tenants to bolster up their case by having a publication of depositions which are ancient records of the Court. There is no absolute right to have the depositions filed. The Plaintiff *Moggridge* did not avail himself of them, and the *Phillipses* ought not to be allowed to do so. They have not come in proper time for the leave now asked, as the dates shew. The case referred to before Lord *Hardwicke* has nothing to do with this application. *Vane* v. *Vane* was a case to perpetuate testimony; but in *Phillips* v. *Llanover* and in *Llanover* v. *Homfray* the evidence was completed in July last.

[They referred to the case of *Forsyth* v. *Ellice* (4).]

W. Pearson, in reply:—

A suit to perpetuate testimony and taking evidence *de bene esse* are precisely the same things in principle.

HALL, V.C.:—

I do not think that I can at this stage of the suits, having regard to the authorities to which my attention has been called, decline to make an order for the publication of the depositions, and therefore I grant the application; but as to whether the evidence can be admitted I will not now give any opinion. I shall know

(1) 2 Dick. 788; 2 Ves. Sen. 497.
(2) 24 W. R. 453; 45 L. J. (Ch.) 589.
(3) Ed. 1840, p. 552.
(4) 2 Mac. & G. 209.

more about it when I am made acquainted with the nature of the suits, and what became of *Moggridge* v. *Hall*, how that suit came to be abated, and so forth; but it appears to me that, considering what Lord *Hardwicke* did in *Duke of Hamilton* v. *Meynal* (1), the order I now make should be without prejudice to any objection which may be made at the hearing. The order will be in the same terms as that of Lord *Hardwicke*, and the costs of this motion will be costs in the suits.

Solicitors: *Ullithorne, Currey, & Villiers; Freshfields & Williams.*

(1) 2 Dick. 788; 2 Ves. Sen. 497.

FRY, J.
1879
Dec. 18, 19.

MYCOCK *v.* BEATSON.

[1878 M. 210.]

Rescission of Partnership Agreement—Fraud—Lien on Assets for Purchase-Money.

The Plaintiff was induced by the fraud of the Defendant to purchase a share of his business, and to enter into partnership with him. Judgment being given for the rescission of the agreement, and the dissolution of the partnership:—

Held, that the Plaintiff was entitled, in respect of the purchase-money which he had paid, to a lien on the surplus of the partnership assets after satisfying the partnership debts and liabilities, and that, in respect of any sums which he had paid or might pay in satisfaction of partnership debts, he was entitled to stand in the place of the partnership creditors to whom he made the payments.

In December, 1877, the Plaintiff and the Defendant *Beatson* entered into partnership with each other as manufacturing chemists, upon the terms expressed in a deed of partnership dated the 11th of December, 1877. The Plaintiff had agreed to purchase a fifth share of the goodwill of the business and of the business premises and stock-in-trade for £5000; and he paid the whole of the £5000 to *Beatson* accordingly. In April, 1878, he agreed with *Beatson* to bring into the business further capital to the amount of £1250, on the terms of his share in the business being increased to one-fourth, and he paid the £1250 accordingly. The deed of partnership provided that *Beatson* should be the managing partner, and should have control over the business and the mode of carrying on the same. On the 17th of July, 1878, *Beatson* filed a liquidation petition, and in February, 1879, he was convicted of obtaining the sum of £5000 from the Plaintiff by false pretences, and was sentenced to imprisonment. The statement of claim alleged that the Plaintiff had been induced to enter into both the agreements by means of fraudulent misrepresentations made by *Beatson* as to the value and profits of the business.

The Defendants to the action were *Beatson* and the trustees under his liquidation. The Plaintiff claimed to have the partnership dissolved and wound up under the direction of the Court; that it might be declared that he was induced to enter into the

partnership and to execute the deed and to purchase the further share in the business by the false and fraudulent representations of *Beatson;* that the agreement and deed of partnership and purchase might be rescinded and set aside, and that it might be declared that the Plaintiff was entitled to have the £6250 paid by him repaid with interest, and to be indemnified against all losses and liabilities incurred by him in respect of the partnership, and that the trustees might be ordered to repay and indemnify him accordingly out of *Beatson's* estate, and that it might be declared that the Plaintiff was entitled, in respect of all moneys payable to him as so paid by him, or as his share of the partnership assets, or by way of indemnity as before claimed, to a charge upon the assets of the partnership.

This was the trial of the action.

Cookson, Q.C., and *Beaumont,* for the Plaintiff:—

It is admitted that the Plaintiff is entitled to a dissolution of the partnership, and the fraud entitles him to the lien which he claims on the partnership assets after satisfying the partnership liabilities.

[FRY, J.:—The rescission of the partnership contract on the ground of fraud would put an end to it *ab initio;* how can you then take any benefit under the contract? The ordinary lien of a partner is founded on the contract of partnership.]

It has been held that a purchaser, who is entitled to have his contract for the purchase of land rescinded, is also entitled to a lien on the land for the purchase-money which he has paid: *Wythes* v. *Lee* (1); *Rose* v. *Watson* (2); *Aberaman Ironworks* v. *Wickens* (3). The principle of those decisions applies to the present case. *Beatson* cannot take advantage of his own wrong to prevent the Plaintiff having the lien to which he would otherwise be entitled, and his trustees stand in the same position.

North, Q.C., and *W. W. Karslake,* for the trustees:—

The Plaintiff is seeking both to approbate and to reprobate the contract. The cases cited do not apply. Under a contract for

(1) 3 Drew. 396. 2 Jur N S 7 (2) 10 H. L. C. 672. 10 Jur N S 297
(3) Law Rep. 4 Ch. 101.

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the purchase of real estate, as was said in *Rose* v. *Watson* (1), upon a payment of part of the purchase-money a corresponding portion of the estate is in Equity transferred to the purchaser. That principle has no application to a contract like the present. In *Aberaman Ironworks* v. *Wickens* (2) the Plaintiffs were sub-purchasers, and the contract between their vendor and the original vendor had not been rescinded, but there had been a compromise. The claim to indemnity against the partnership liabilities is a matter outside the present action.

The Defendant *Beatson* did not appear.

FRY, J., after stating that he had come to the conclusion upon the evidence that the statements made by the Defendant *Beatson* to the Plaintiff were false, and that they operated upon the Plaintiff's mind to induce him to enter into the partnership, continued:—

The result, in my judgment, is that the partnership deed cannot stand, and that there must be a dissolution of the partnership, and a declaration that the Plaintiff is entitled to have the agreement rescinded on the ground of fraud.

Then arises the question, Is the Plaintiff entitled to a lien, for the sum or sums of money which he has paid for the purchase of an interest in the partnership property, upon the surplus assets of the partnership, after satisfying all the partnership liabilities? I must observe that the transactions between the Plaintiff and the Defendant *Beatson* were really of a twofold nature. There were purchases by the Plaintiff of interests, amounting in all to one-fourth, in the partnership property, and there was an agreement that the two persons who thus became jointly interested in the partnership property should enter into the relation of partners. It was under the first of these bargains that payments amounting to £6250 were made to the Defendant *Beatson*, and for that sum I hold that the Plaintiff is entitled to the lien which he claims. I come to that conclusion upon the authority of *Rose* v. *Watson* and *Aberaman Ironworks* v. *Wickens*. The only distinction which has been suggested between the latter case and the present, is, that the one related to a sale of land and the other to a sale of

(1) 10 H. L. C. 672. (2) Law Rep. 4 Ch. 101.

a share of partnership property. That distinction appears to me to have no substance, and the decision given in the latter case must govern the present one.

Then the Plaintiff claims a further lien for all sums which he has paid in his character as partner, and it appears to me that he is also entitled to that lien. It cannot be disputed that if the partnership had existed and had been dissolved in the ordinary way, he would have had a lien upon the surplus assets for everything due to him from his fellow partner in respect of the partnership, and I think that he is entitled to the same lien under the actual circumstances.

There will be a declaration that the partnership agreement ought to be rescinded on account of the fraud of *Beatson;* a declaration that the Plaintiff is entitled to a lien on the surplus of the partnership assets after satisfying the partnership liabilities for the £6250, with interest at 5 per cent.; and a declaration that the Plaintiff is entitled to stand in the place of the creditors of the partnership for any sums which he has paid or may pay in respect of the partnership liabilities. There will be an inquiry what is the net surplus of the partnership property after satisfaction of all the partnership debts and liabilities, and an inquiry as to the sums paid by the Plaintiff in respect of those debts and liabilities, and the Plaintiff must have liberty to apply in Chambers to realize the liens to which I have declared him entitled.

Of course the Plaintiff is entitled to the costs of the action, and he will add them to the amount for which he is to have a lien.

Solicitors for Plaintiff: *Learoyd, Learoyd, & Peace.*

Solicitors for Trustees: *Jacobs & Vincent,* agents for *North & Sons, Leeds.*

FRY, J.
1879
Dec. 19.

LONG *v.* CROSSLEY.

[1877 L. 126.]

Pleading—Parties—Amendment—Addition of New Plaintiff—Rules of Court, 1875, *Order* XVI., *rr.* 2, 13.

An action was brought to compel the Defendants specifically to perform an agreement into which they had entered to accept a lease of a coal mine from the Plaintiff. When the agreement was entered into, and when the action was commenced, it was supposed that the Plaintiff was tenant for life of the property under the will of her husband, and that she had a power of leasing. After notice of trial had been given the Plaintiff died, and her executor obtained the common order of revivor. After this it was discovered that the Plaintiff was tenant for life of the property under her marriage settlement, and that she had no power of leasing. She had signed the agreement "for myself and those entitled after me," though this did not appear in the statement of claim. The persons entitled in remainder, of whom the executor was one, desired to adopt the action and to be added as co-Plaintiffs, alleging that the agreement had been entered into with their knowledge and approbation:—

Held, that rule 13 of Order XVI. of the Rules of Court, 1875, applied, and that the remaindermen must be added as co-Plaintiffs with the executor in his representative capacity.

THIS was an action for the specific performance by the Defendants of a written agreement for a lease of some coal mines in *Glamorganshire* by the Plaintiff to them.

The statement of claim alleged that, at the date of the agreement, the Plaintiff, *Mary Webb Long*, a widow, was the tenant for life in possession of the property comprised in the agreement, without impeachment of waste, with power to grant mining leases thereof. The agreement bore date the 24th of February, 1873. It described the property as "belonging to Mrs. *Long* and those entitled after her." It contained a power for the lessees to determine the lease by giving twelve months' notice in writing at the end of any period of two years, commencing from the 29th of September, 1872. It was, in fact, signed by the Plaintiff "for myself and those entitled after me," but this did not appear in the statement of claim. The statement of claim, which was delivered on the 4th of February, 1878, alleged that the Plaintiff

had always been ready and willing to grant the Defendants a lease of the property according to the terms of the agreement; that the Defendants refused to accept a lease according to those terms; and that, in September, 1876, the Defendants sent to the Plaintiff a notice purporting to determine the agreement on the 29th of September, 1877, but that this notice did not comply with the provisions of the agreement, and was invalid.

By their statement of defence, which was delivered on the 18th of February, 1878, the Defendants denied that the Plaintiff had ever been ready and willing to grant them a lease according to the terms of the agreement, and said that they had never refused, and did not refuse, to accept a proper lease in accordance with the terms of the agreement, but had always been, and still were, willing to do so, and that no such lease had been tendered to them.

By her reply, delivered on the 6th of May, 1878, the Plaintiff joined issue on the statement of defence.

On the 21st of March, 1879, the Plaintiff died. At this time notice of trial had been given, and the action had been set down for trial. On the 18th of April, 1879, upon the petition of *D. W. Long*, the son and the sole executor of the Plaintiff, the common order of revivor was made in favour of the Petitioner.

When the agreement of the 24th of February, 1873, was entered into, and when the statement of claim in the action was drawn, it was supposed by Mrs. *Long's* legal advisers that she was entitled to the property comprised in it as tenant for life under the will of her husband, and that she had a power to grant mining leases. After her death, and after the order of revivor had been made, it was discovered that she was in fact entitled to the property as tenant for life under the settlement executed on her marriage; that she had no power of leasing; and that, by virtue of the settlement and of an appointment made by the husband and wife in exercise of a power contained in the settlement, the son, *D. W. Long*, became, upon his mother's death, tenant in fee simple of the property, subject to an annuity of £10 charged upon it in favour of his sister, Mrs. *Jones*, for her life. An affidavit was then made by *D. W. Long* and Mr. and Mrs. *Jones*, in which the deponents said that Mrs. *Long* entered into the agree-

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ment in question with their full knowledge and approbation, and that they would, if they had been requested so to do, have at any time concurred in a lease of the property to the Defendants, in accordance with the terms of the agreement. *D. W. Long* said that he, since the death of his mother, had always been ready and willing, as the person entitled to the fee simple in possession of the property, to grant to the Defendants a lease thereof in accordance with the terms of the agreement. He further said that he desired to adopt the proceedings in the action, and to be made a party thereto as Plaintiff in his capacity of owner in fee simple in possession of the property, as well as in his capacity of executor of his mother, and that the action might be carried on between himself, as owner of the fee simple, as well as executor of his mother, and the Defendants. Mr. and Mrs. *Jones* said that they were willing to be made parties to the action, if the Court should so direct.

The action was in the paper this day for trial.

Romer, and *Levett*, for the son :—

We ask for leave to amend by adding *D. W. Long* and Mr. and Mrs. *Jones* as co-Plaintiffs with the son in his character of executor. The Court has power to do this under rules 2, 3 of Order XVI. of the Rules of Court, 1875: *Duckett* v. *Gover* (1).

North, Q.C., and *W. Renshaw*, for the Defendants:—

This is not a case in which the Court will exercise the power given to it by the rules: *Clowes* v. *Hilliard* (2); *Evans* v. *Bagshaw* (3). In *Duckett* v. *Gover* it was clear that the original plaintiff might have been a proper plaintiff under some circumstances. In the present case Mrs. *Long* had no power to bind anything but her own life interest. The action came to an end on her death, and her executor could have no interest whatever in the subject-matter of it. There never was any contract between us and the persons who now seek to adopt it; we repudiated the agreement before they sought to ratify it. They were not bound to us, and therefore we could not be bound to them. If the

(1) 6 Ch. D. 82. (2) 4 Ch. D. 413.
(3) Law Rep. 5 Ch. 340.

amendment asked for is made, the proposed Plaintiffs cannot succeed in the action.

FRY, J.:—

I think that I ought to allow Mr. *Long* and his sister and her husband to be added as co-Plaintiffs with Mr. *Long* in his character of executor to his mother. When the action was commenced, it appears that it was brought under the mistaken belief that the Plaintiff was tenant for life of the property under the will of her husband, and that she had power to grant leases; whereas she was really tenant for life under her marriage settlement, but had no power of leasing. She, however, as it now appears, signed the agreement with the Defendants on behalf of herself and those entitled after her, but this seems to have escaped the attention of the pleader who drew the statement of claim. The persons who are entitled to the property in remainder are now desirous of taking up the litigation. The 13th rule of Order XVI. provides that the Court may, at any stage of the proceedings, order "that the name or names of any party or parties" (which I take to mean "any person or persons") "whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added." What is the question involved in the present action? Put broadly, it is the specific performance of the contract with the Defendants. Is the presence of Mr. *Long* and his sister necessary in order to enable the Court effectually and completely to adjudicate upon and settle this question? It appears to me that it is. It is said by Mr. *North* that, if they are added as co-Plaintiffs, the action must still fail. I think that at present I have nothing to do with that. The object of the provisions of the rules was, not that a party's case should be so framed as to succeed, but that it should be so framed that it can be adjudicated upon by the Court, whether in his favour or against him. I therefore allow an amendment by adding the proposed co-Plaintiffs, and by stating the Plaintiff's title under the marriage settlement.

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Romer:—I also wish to amend by stating that the Plaintiff entered into the agreement on behalf and by the authority of the persons entitled in remainder, and by alleging that they have always been ready and willing to perform the agreement.

FRY, J., assented, and added that the trial would stand over, the Plaintiffs paying the consequent costs. The Defendants would also have liberty to amend.

Solicitors for Plaintiff: *Hacon & Turner*, agents for *Charles Norton, Swansea.*

Solicitors for Defendants: *Renshaw & Renshaw.*

In re DERING'S PATENT.

L. C. 1879 Dec. 13.

Patent—Provisional Protection—Sealing Patent—Priority.

The Crown will in some cases, after granting one patent, grant a second patent for a similar invention.

D. and *R.* independently applied on the 29th of April, 1879, for letters patent for inventions, which were, for the purpose of the decision, taken to be similar. *R.'s* letters patent were sealed on the 25th of July, 1879, and on the 5th of August, 1879, he entered an opposition to the sealing of *D.'s* letters patent. There was no suggestion of fraud:—

Held, that *D.'s* letters patent ought to be sealed and be dated as of the day of application, which was also the date of *R.'s* letters patent.

Ex parte Bates & Redgate (1) questioned.

THE Petitioner, Mr. *G. E. Dering*, on the 29th of April, 1879, left at the Patent Office the usual petition for the grant of letters patent for an invention relating to the manufacture of iron and steel, and in due course obtained provisional protection. Upon the same day a similar petition was left by Mr. *Edward Riley*, and he also obtained provisional protection for what was assumed in the course of argument to be substantially the same invention. On the 25th of July, 1879, Mr. *Riley's* letters patent were sealed, and on the 5th of August, 1879, he entered an opposition to the grant of the seal upon *Dering's* application for the seal, which was made at a subsequent date. *Dering* thereupon presented a petition in the usual way to have the Great Seal affixed to his letters patent.

Aston, Q.C. (*Macrory* with him), after pointing out that this case was remarkable in that both applications for provisional protection were made upon the same day, proceeded to argue upon the evidence that there was a substantial difference in the nature of the two inventions, and therefore the rule in *Ex parte Bates & Redgate* (1) did not apply.

[He was stopped by the Lord Chancellor.]

THE LORD CHANCELLOR:—I do not say that I wish to unsettle the

(1) Law Rep. 4 Ch. 577.

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decision in *Ex parte Bates & Redgate* (1), but I think that it is open to reconsideration. I think it was a very hard case. Assuming, however, that there is here a similarity between the two inventions, is not this case distinguishable from *Ex parte Bates & Redgate?*

Chadwyck Healey (*Burnie* with him), for opponent:—

I claim the benefit of *Ex parte Bates & Redgate* as expressly in my favour. Indeed this is, if possible, a stronger case. In *Ex parte Bates & Redgate* the application of *Bertie*, who obtained the seal, was a month later in date than that of *Bates & Redgate.* Nevertheless he succeeded in preventing the earlier applicants from obtaining letters patent. Here the applications are of even date. There is no better equity with *Dering* than with *Riley.* The latter has been more diligent, and there being no suggestion of fraud, he is entitled to the benefit of his diligence. Diligence in these matters is a public gain. In *Ex parte Harrison* (2) your Lordship seems to have expressed an intention to follow the rule in *Ex parte Bates & Redgate,* if upon a perusal of the specifications a similarity of invention should appear. It turned out that there was no similarity, and therefore the case did not turn on that.

There is no guarantee by the Crown on the grant of provisional protection that letters patent will be granted: *Ex parte Bates & Redgate.* By provisional protection an applicant is only protected against the results of his own or other publication, provided he is watchful and diligent in opposing a grant to another. The Crown will not knowingly grant two patents for the same invention. It is contrary to public convenience that a double grant should be made: *Ex parte Bates & Redgate* and *Ex parte Manceaux* (3). If *Dering's* letters patent are sealed, the public will not know to whom to apply for licenses, and if *Riley* sued in respect of an infringement a license from *Dering* might be successfully pleaded. *Riley* and *Dering* will be placed in a position of great difficulty in respect of one another's rights. Moreover, if *Dering* succeeds in obtaining the seal, his letters patent will bear

(1) Law Rep. 4 Ch. 577. (2) Law Rep. 9 Ch. 631.
(3) Law Rep. 6 Ch. 272.

an earlier number than *Riley's*, and although it has never been decided that priority may turn upon numerical order, that would be an argument fairly open in an action upon *Riley's* patent. By the *Patent Law Amendment Act*, s. 23, the Lord Chancellor has power to date *Dering's* patent as of any date between that of application and application for the seal. It is not sought to deprive *Dering* of a patent for anything contained in his provisional specification not already covered by *Riley*, but if there be a possibility of conflict the practice is to date the second patent as of the day of application for the seal, and a reference is directed if necessary: *Ex parte Bailey* (1); *Seton* on Decrees (2). If Lord *Hatherley*, in *Ex parte Bates & Redgate* (3), had felt any difficulty in granting a patent to the earlier applicants on the ground that such patent would override that already granted to the later applicant, *Bertie*, he could have dated the second patent as of the date of *Bertie's* patent. It is submitted that it is impossible to distinguish this case from *Ex parte Bates & Redgate* and subsequent authorities of the same kind.

EARL CAIRNS, L.C.:—

If this case were like the case of *Ex parte Bates & Redgate* I certainly should have hesitated for some time before I acted in opposition to that decision, considering the authority by whom that case was decided, and that that decision has been followed in subsequent cases. I may, however, state my objections to that decision, which I never could thoroughly understand. It has always seemed to me that if Parliament held out to inventors the advantage they should get from provisional protection, the inventor should have the enjoyment of that advantage for the six months granted to him. Parliament intended the six months to be for the completion of the invention, and for perfecting the specification, and never said that the applicant should be deprived of or lose that advantage by want of any due diligence on his part. The applicant was told that for six months he was to some extent secure. It always seemed to me that if a man applies on, say,

(1) Law Rep. 8 Ch. 60. (2) 4th Ed. vol. i. p. 338.
(3) Law Rep. 4 Ch. 577.

L. C. 1879 *In re* DERING'S PATENT.

the 1st of May for a patent, and another applies on, say, the 1st of June for a patent for the same thing, and the second applicant obtains the Great Seal first, it is very hard to deprive the applicant of the 1st of May of the benefit of his invention. It appears to me very like a breach of contract with the first inventor to give a subsequent applicant an advantage because the latter has outrun him, and a very hard thing upon him. However, the case before me is not like the case of *Ex parte Bates & Redgate* (1). There is no exact precedent, so far as I am aware, and so far as I am informed by those who have experience in these matters, for this case. Two applicants apply in perfectly good faith upon the same day for patents for what I may call cognate inventions, made respectively by each applicant without any knowledge of what the other was doing or had done. I will assume now that to a greater or less extent those inventions are identical. Before the six months are out one of the applicants succeeds in getting his letters patent sealed. Now what is the position of the Crown? and what should the Crown do in such a case? *Primâ facie* the Crown ought to seal both patents. The contract with each of them on provisional protection was that he should have six months' protection. Now, if it is true that both have acted in good faith, what right have I to confiscate the invention of one because it happens to be identical with the invention of the other? Again, what harm can possibly happen by the seal being affixed to both patents? If one patentee by himself or his licensee uses the invention, how can the other prevent him—what can the other say? He can only say, You are infringing my patent. The first would reply, I have a patent of the same date; to which the second would rejoin, My invention was patented before yours. And this statement he can only support by the production of a document bearing the same date as that of his adversary. It seems to me to be clear that neither can restrain or interfere with the other. Why should they not have become joint proprietors of this invention by agreement between themselves? I cannot see any reason why they should not, and if so, why cannot they in effect be made co-proprietors by the grant of separate letters patent? It seems to me on these grounds that I ought not to

(1) Law Rep. 4 Ch. 577.

refuse to seal Mr. *Dering's* letters patent, and I will extend the time for filing his final specification fourteen days (1).

I make no order as to costs.

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Solicitors for Petitioner: *Wilson, Bristows, & Carpmael.*
Solicitors for Opponent: *Faithfull & Owen.*

In re SOMERSET AND WALKER'S PATENT.

L. C. 1879 Dec. 13.

Petition to seal Patent—Application after Period of Provisional Protection—Extended Time for Filing Specification—15 & 16 *Vict. c.* 83, *s.* 20; 16 & 17 *Vict. c.* 115, *s.* 6.

The word "caveat" in the 20th section of the *Patent Law Amendment Act* means anything in the nature of an opposition at any stage, and is not confined to opposition before the Lord Chancellor.

There is jurisdiction to seal a patent notwithstanding that application for the seal may not have been made within the period of provisional protection and one month further, provided the delay has been caused by opposition.

The Lord Chancellor has power, in such a case, to extend the time for filing the final specification beyond one month after the expiration of the term of provisional protection.

MESSRS. *JOHN SOMERSET* and *James Walker* left at the Great Seal Patent Office, on the 5th of March, 1879, the usual petition for letters patent for "improvements in the construction of frames and handles of umbrellas and parasols." The petition was accompanied by a provisional specification. Provisional protection was allowed in due course, and the application carried through in the usual way down to the issue by the Law Officer of his warrant for sealing. On the 4th of September, 1879, the day before the expiration of the six months' provisional protection, the applicants, under the belief that the letters patent were sealed, left for filing at the Patent Office their final specification. They then found that opposition to the sealing had been entered by Mr. *G. H. Spencer* as late as the 2nd of September.

(1) The Lord Chancellor afterwards further extended the time for filing this specification in consequence of an application of a prior date to that of *Dering* being made for an invention under a similar title. The time of filing both specifications was fixed for the same day.

Ex relatione Mr. *Macrory.*

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A petition was accordingly presented to the Lord Chancellor on the 16th of September, 1879, praying that notwithstanding the opposition the Great Seal might be affixed which petition came on to be heard on the above date.

Prior to the hearing the opposition was withdrawn.

Chadwyck Healey, for the Petitioners, stated the facts, and submitted that the Lord Chancellor had full jurisdiction to make the order, and to extend the time for filing the final specification: 15 & 16 Vict. c. 83, s. 20; 16 & 17 Vict. c. 115, s. 6, and referred to *In re Johnson's Patent* (1).

(1) 1878. Nov. 18.

In re JOHNSON'S PATENT.

ON the 9th of March, 1878, Mr. *J. H. Johnson* applied for letters patent in respect of an invention for improvements in electric apparatus, communicated to him from abroad by Messrs. *Gramme* and *D'Ivernois*. On the 28th of March, 1878, a Mr. *Wilde* applied for letters patent for what he subsequently contended was a similar invention. Both parties received provisional protection, and *Wilde's* patent was sealed on the 31st of May, 1878.

Johnson gave notice to proceed on the 21st of June, 1878, and *Wilde* gave notice of objection on the 15th of July, 1878.

The usual declarations were filed on both sides, but in consequence of the absence of the Law Officer from town the hearing could not be fixed for an earlier date than the 28th of October, 1878.

At the hearing,

Aston, Q.C., for the opponent, took the preliminary objection that the Law Officer could not in any case grant his warrant for sealing, because the period of provisional protection and the additional month allowed by 16 & 17 Vict. c. 115, s. 6, had expired.

Sir *J. Holker*, A.G., held that, assuming the objection to have force, it must be taken before the Lord Chancellor. He then allowed the application on the terms that the patent be dated the 29th of March, 1878, one day after the date of *Wilde's* patent.

The matter was then brought before the Lord Chancellor by petition in the usual way. Upon the petition being presented doubt was expressed by his Lordship's secretary whether, having regard to the terms of the 6th section of 16 & 17 Vict. c. 115, the Lord Chancellor had jurisdiction to extend the time beyond seven months. The Petitioner then lodged a statement referring to the 15 & 16 Vict. c. 83, s. 20, and the petition was answered.

At the hearing,

Webster, Q.C., for the Petitioner, referred to 15 & 16 Vict. c. 83, s. 20, and argued that "caveat" meant anything in the nature of opposition, whether before the Law Officers or the Lord Chancellor, and that sect. 6 of 16 & 17 Vict. c. 115, did not apply to this case.

Macrory, for *Wilde*, *contrà*.

EARL CAIRNS, L.C., after stating fully the facts of the case, and observing that there did not appear to have

EARL CAIRNS, L.C., made the order as prayed, and extended the time for filing the specification fourteen days from the date of the order.

The costs had been agreed.

Solicitor for Petitioners: *Bristow Hunt.*

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been any unnecessary delay, and that it would have been strange if the Act had made no provision for the case, held that the word "caveat" in sect. 20 of 15 & 16 Vict. c. 83, clearly meant anything in the nature of an opposition at any stage, and was not confined to the opposition at the Great Seal, which was the meaning of "caveat" under the old practice. He accordingly made the order as prayed, and extended the time for filing the specification fourteen days.

Solicitor for Petitioner: *J. Henry Johnson.*

Solicitor for Opponent: *W. R. Francis.*

C. A.
1879
Nov. 21, 22, 24.

In re DIAMOND FUEL COMPANY.

Company—Winding-up—Petition by Shareholder whose Calls are in Arrear—Petition by fully paid-up Shareholder—Appeal by Company from Winding-up Order—Security for Costs.

26 Ch D 155
169
23 Ch D 370

A company had for some time ceased to carry on business, though it was not clearly made out that it had so ceased for a year. Its business had been carried on at a constant loss; all its capital had been expended; its property had been sold at a ruinous sacrifice with the exception of some patents which were nearly worthless, and it had nothing left but these patents and a sum of money far from sufficient for payment of its debts. A shareholder, who had paid up his shares with the exception of the last call, presented a petition for winding up, alleging a case of misconduct against some of the directors, by reason of which, if established, they would be liable to pay considerable sums to the company, which would probably leave a surplus for division among the shareholders. At the hearing, the objection being taken that the Petitioner being in default for payment of calls could not petition, he offered to pay the amount into Court. *Malins*, V.C., allowed him to do so, and made a winding-up order. A liquidator was then appointed, after which the company appealed. One of the directors had in the meantime been ordered to pay a considerable sum under sect. 165 of the *Companies Act*, 1862:—

Held, that although a liquidator had been appointed the company was not precluded from appealing:

Held, also, that the fact that a shareholder is in arrear with calls is not an absolute bar to his petitioning for a winding-up order:

Held, that as it was established that the business of the company could not possibly be resuscitated, it was just and equitable that the company should be wound up; and that as a reasonable probability was shewn that sums could be recovered from the directors to such an amount as would leave a surplus for division among the shareholders, an order for winding up had been properly made on the petition of a fully paid-up shareholder.

Where a company alone appeals from a winding-up order without joining any one personally responsible for costs, an application for security for costs will be entertained.

THE *Diamond Fuel Company, Limited*, was registered on the 27th of January, 1873, its principal objects as defined by the memorandum of association being the purchase of certain inventions, patents, and patent rights for the manufacture of artificial fuel, and working and granting licenses for working the same. The nominal capital was £200,000 in 40,000 shares of £5 each.

In 1879 a petition was presented by *Nutting* and *Sullivan* for

the winding-up of the company. *Nutting* was a creditor, but withdrew from the proceedings before the petition was heard, and the petition may therefore be considered as one by *Sullivan* only. *Sullivan* was a holder of 200 shares.

The petition, after stating the objects and the incorporation of the company, contained allegations to the following effect:—

That all the shares had been allotted, but that some of them had been forfeited for non-payment of calls. That calls had been made to the extent of £80,000, of which £2375 was in arrear.

That in 1864 the patents were the property of *D. Barker*, who sold them in that year to a company for £250 in cash and £750 in fully paid-up shares. That the company having failed, *Barker* obtained a reassignment in 1872, and in the same year sold a moiety to *T. D. Clare* for £600.

That on the 15th of November, 1872, a provisional agreement was entered into by *Barker* and *Clare* with *F. L. Price*, as a trustee for the intended *Diamond Fuel Company*, for the purchase of the patents from *Barker* and *Clare* for £55,000, of which £15,000 was to be paid in cash and £40,000 in fully paid-up shares. It was provided that the certificates of 5600 of these shares should not be delivered to *Barker* and *Clare*, but should be retained in the hands of the company for two years from the date of incorporation; but such shares were to be entitled to dividends as soon as a dividend of £10 per cent. should have been paid for one year on the amount credited as paid on all the other shares in the capital.

That the company was promoted by several persons, and among others by *Mitcalfe*, *Griffiths*, *Parry*, and *Price*. That the agreement of the 15th of November, 1872, was not a *bonâ fide* agreement, but was entered into for the purpose of misleading the public, and with the intention that *Barker* and *Clare*, after retaining £2000, should repay the balance to the promoters without the knowledge of the shareholders.

That the provisional agreement was adopted by the articles of association.

That after the formation of the company cheques amounting to £15,000 were drawn by the directors and secretary of the company in favour of the solicitor of *Barker* and *Clare*; but that ultimately out of this sum £3900 found its way into the hands of *Mitcalfe*,

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a promoter and director; £5000 into the hands of *Parry*, a promoter and director; £250 into the hands of *Griffiths*, a promoter and director. That *Price*, who was secretary, received £200 out of it, and only a little more than £2000 was received by *Barker* and *Clare*.

That in the early part of 1878, *Mitcalfe*, *Parry*, *Griffiths*, and *Price*, were summoned at the *Guildhall* Police Court for having appropriated £10,000 of the moneys of the company. That at the hearing of the summons the secretary of the company produced cheques drawn by the directors and countersigned by the secretary in April and May, 1873, for £10,000, £3000, and £2000, in favour of the solicitor of *Barker* and *Clare*. That the solicitor was examined, and stated that he did not pay the £10,000 cheque to *Barker* and *Clare*, but paid out of it £2500 to *Mitcalfe* and £2500 to *Parry*, and that he afterwards paid *Parry* a further sum of £2500. That the summons was dismissed in consequence of the non-attendance of a material witness, the alderman presiding having refused to adjourn the case for his attendance.

That 5600 fully paid-up shares were allotted to *Barker* and *Clare*, and were transferred by them to the directors and promoters without any consideration being given for them.

That on the 28th of May, 1878, and subsequent days, the whole of the plant and machinery of the company were sold for a very small sum, the amount of which the Petitioner could not ascertain, though he had repeatedly written to the secretary of the company and to the auctioneers for information.

"29. The whole of the plant and machinery has been so sold, and the company cannot manufacture any more fuel or carry on more business, and has in fact ceased to do so."

That on the 21st of December, 1877, a promissory note was signed in favour of the directors and discounted. That it had become due, and that the proceeds of the sale were being employed in paying off this and other sums.

That the works and plant at the *Belvedere Works* of the company, on which the directors had spent £38,000, had been sold for about £3000. That there was a sum of over £3000 in the hands of the auctioneers, which had been attached by some creditors and was in jeopardy.

That *Sullivan*, the Petitioner, held 200 shares of £5 each, on which he had paid £900; and that, on being aware of some of the above facts, he declined to pay the remaining £100. That an action for that sum had been commenced against him by the company, but had been discontinued.

"The company has never declared a dividend, and during the whole course of its existence there has been an annual cumulative deficit, reaching by the balance-sheet of 1876 to £22,206 18*s.* 8*d.*, and the said company has also ceased to carry on any business, and is unable to pay its debts, owing to the circumstances hereinbefore stated; and if it is permitted to be wound up in any way, except under the direction of this honourable Court, the creditors will lose their debts, besides the whole of the share capital being lost to the shareholders. If, on the other hand, an independent liquidator is appointed by this Court, a large sum will be able to be recovered from the directors and promoters, and the creditors will be able to be paid in full, besides a considerable fund being realized to recoup the shareholders the share capital invested by them, and it is therefore just and equitable that the company should be wound up."

The petition asked for the usual compulsory order for winding up the company.

The evidence shewed that all the shares allotted were, with a trifling exception, fully paid up; that the assets were all gone, with the exception of the sum of about £3000 arising from the sale of the *Belvedere Works* and the patents, two of which, however, had expired. The evidence satisfied the Court that the remaining patents were of very small value, and that carrying on the business of the company in the way of granting licenses to use them was out of the question. The debts of the company were more than sufficient to absorb the assets in hand, and there could not be any surplus unless moneys were recovered from the directors in respect of their proceedings impeached by the petition.

In 1877 a petition for winding up was presented by a fully paid-up shareholder, and opposed by a large body of shareholders. It was dismissed in January, 1878, by the Master of the Rolls, on the ground that the Petitioner, a fully paid-up shareholder, simply

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alleged the company to be insolvent, thus in fact negativing the possibility of a surplus. On the present occasion a considerable body of shareholders supported the petition, and it was not shewn that any of the shareholders were opposed to it.

At the hearing before Vice-Chancellor *Malins* it was objected that the Petitioner, being in default for payment of calls, could not petition. He offered to pay the call into Court. The company urged that when he had done so he would be a fully paid-up shareholder, and could not petition, as it was not alleged that there would be any surplus, unless moneys were recovered from the directors for misfeasance, and that the possibility of such recovery did not remove the objection.

Vice-Chancellor *Malins* allowed the Petitioner to pay his call into Court, which was done, and on the 1st of February, 1879, his Lordship made an order for winding up. The company appealed.

In July, 1879, an order was made on *Mitcalfe*, one of the directors, under sect. 165 of the *Companies Act*, 1862, for payment of upwards of £5000, in respect of fully paid-up shares which had been given to him as mentioned in the winding-up petition. This order was under appeal at the time when the appeal from the winding-up order came on to be heard (1).

On the appeal coming on to be heard on the 21st of November,

S. Brice, for the official liquidator, took a preliminary objection:—

The liquidator was appointed before the appeal was presented, and after his appointment no one but he can act on behalf of the company: *Companies Act*, 1862, s. 95. The appeal therefore is irregular. *In re National Funds Assurance Company* (2) does not support it, for there no liquidator had been appointed. The directors ought to appeal in their private capacity, or apply by summons for leave to use the name of the company.

[JAMES, L.J.:—Has that ever been done?]

J. Pearson, Q.C., for the company:—

The order is made against the company, and the company must

(1) *Ante*, p. 169. (2) 4 Ch. D. 305.

have a right to appeal from it. No doubt the liquidator is the only person to act if the winding-up order is valid, but that is the point in dispute. Everybody has a right to appeal from an order made against him, and a company cannot be in any different position. It is suggested that we should apply by summons for leave to use the name of the company, but I could not advise the directors thus to go in under an order the validity of which they dispute.

[JAMES, L.J.:—A company is a mere name. Who, in fact, authorized the appeal?]

The directors at a board meeting.

[JAMES, L.J.:—Are not the powers of the directors suspended?]

I submit that for this purpose they are not; the company must have a right to be heard to say that the winding-up order is wrong. The functions of the directors can only be suspended *sub modo, i.e.*, provided the order can be maintained.

[*Higgins*, Q.C., referred to *In re Regent United Service Stores* (1).]

In the case of a voluntary winding-up it is provided that the powers of the directors shall cease: sect. 132, sub-sect. 5; but there is no similar enactment in the case of a compulsory order. The objection involves an absurdity: it is said that the company can only appeal through the liquidator. Is he then to appeal from an order by which he derives his title?

JAMES, L.J.:—

It deserves consideration what ought to be done in future with regard to appeals of this nature; but as the present appeal has been presented in conformity with the usual practice we will hear it on the merits.

BAGGALLAY and THESIGER, L.JJ., concurred.

J. Pearson, Q.C., and *Farwell*, for the appeal:—

At the time when the petition came on to be heard the Petitioner was in default for payment of calls, and no order ought

(1) 8 Ch. D. 75.

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to have been made: *In re Steam Stoker Company* (1), following *In re European Assurance Society* (2).

[*Glasse*, Q.C., referred to *Re Birch Torr and Vitifer Company* (3).]

JAMES, L.J.:—

I think that this objection cannot be maintained. I think that in *In re European Assurance Society* I was rather supplementing the Act than interpreting it.

BAGGALLAY and THESIGER, L.JJ., concurred.

The Petitioner at all events can be in no better position than if he had paid his calls before the petition was presented, and must be treated as a fully paid-up shareholder. The circumstances under which a fully paid-up shareholder can obtain a winding-up order are defined in *In re Rica Gold Washing Company* (4), and the Master of the Rolls there expresses a strong opinion that a winding-up petition by such a shareholder cannot be supported by alleging circumstances which shew that the directors may be compelled to refund money where it is not shewn that there is a surplus from other sources. The company has its patents, and may still carry on business by granting licenses. The charges of fraud against the directors are supported only by an affidavit as to information and belief, which is insufficient: *Gilbert* v. *Endean* (5).

Glasse, Q.C., and *C. H. Turner*, for the Petitioner:—

The company is unable to carry on business, its patents are worthless, the capital is gone, and though it is not strictly shewn that the company has not carried on business for a year, the case is *ejusdem generis* with that. Part of the purchase-money for the patents is traced into the hands of the directors, and a strong *primâ facie* case is made for recovering money from them. An order has actually been made against one of them, which shews, at all events, a probability of success in proceedings against them.

(1) Law Rep. 19 Eq. 416.
(2) Ibid. 10 Eq. 403.
(3) 1 K. & J. 204.
(4) 11 Ch. D. 36.
(5) 9 Ch. D. 259.

There is, therefore, reasonable ground to expect a surplus for division. We cannot get at the directors except by means of a winding-up. In the case of the *Rica Gold Washing Company* (1) the petition did not contain any allegations of facts which shewed that the directors were liable to refund.

Higgins, Q.C., and *Whitehorne*, for a number of shareholders, supported the order.

J. Pearson, in reply.

JAMES, L.J.:—

I am of opinion that in this case the order of the Vice-Chancellor ought to be affirmed.

The ground for the order seems to me to be this, that the company had, to all intents and purposes, come to an end without the slightest hope or prospect of ever being resuscitated. The capital which had been expended upon their works, to the extent altogether of about £40,000, was all lost, with the exception of £3000, which resulted from the sale of the works, plant, and the business of manufacturing. The real substantial business of the company was the carrying on of the works which they had established, and in which they had gone on incurring enormous losses from time to time. They had sold up all they could, and for a long time up to the time of their sale they had done nothing whatever which could be considered as carrying on the business of the company, or as doing anything to carry into effect the objects of the company. The English patents had either expired or were on the point of expiring at the time when this petition was presented; neither the English patents nor the foreign patents produced anything, and they were at the lowest ebb. The real value of the patents is best evidenced, not by such a sale as the sham sale that was made to a trustee for the company, but the real sale, which had been made for a few hundreds of pounds some short time before, when the patents had a little more time to run. Therefore, I am satisfied that the patents were really of merely nominal value, and that it is utterly impossible to think that anything could be done, or that there was any prospect for

(1) 11 Ch. D. 36.

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doing anything with them at the time when the petition was presented. The Vice-Chancellor, in my opinion, was quite right in taking the view that the company practically had ceased to carry on its business, and that the carrying on of the business had become, in a practical sense, impossible. Under those circumstances it was the right of the shareholders to have the concern wound up, and a case is alleged which shews there were moneys to be recovered for the purpose of being divided amongst them. That case has this foundation, that it not only is alleged by the petition, but the circumstances have been investigated and have resulted in an order, which we must assume for the present to be a well founded order, directing the repayment to the liquidator of the company, for distribution among the shareholders, of a sum of above £5000 by one of the directors. Under those circumstances there is no sufficient ground for differing from the Vice-Chancellor in the conclusion that he has arrived at, that it was just and equitable that the company should be wound up.

BAGGALLAY, L.J.:—

I am of the same opinion. The circumstances under which the Court has jurisdiction to make a winding-up order are set forth in five well known sub-sections of the 79th section of the Act of Parliament. The first four of those sub-sections enumerate the particular states of circumstances under which the order may be made, and the fifth is in the general terms, "whenever the Court is of opinion that it is just and equitable that the company should be wound up." Now from the earliest time it has been held that the circumstances under which it is just and equitable to make a winding-up order must have reference to matters *ejusdem generis* with the matters which are referred to in the four previous sub-sections. The mere fact that the Court is of opinion that the business cannot be carried on, or probably will not be carried on, in a successful manner is not sufficient. So, again, mere misconduct or mismanagement on the part of the directors, even although it might be such as to justify a suit against them in respect of such misconduct or mismanagement, is not of itself sufficient to justify a winding-up order. But what we have to consider is, having regard to all the surrounding circumstances in

this case, whether, if they do not fall within any of the first four sub-sections, they are not circumstances *ejusdem generis* with one or more of those referred to in the first four sub-sections.

Now I am by no means certain that in this case there has not been a suspension of the business of the company for a period of twelve months. I am rather disposed to think that there has. I do not, however, rest my decision on that, but upon the fifth sub-section, that it is just and equitable that the company should be wound up. What are the prospects of the company carrying on its business? As was held in the case of the *Suburban Hotel Company* (1), where you find that the substratum is altogether gone, the Court will make an order for the winding-up of the company.

It appears from the balance-sheet of December, 1876 (since which time very little, if anything, seems to have been done with regard to the business of the company), that in round numbers the capital then subscribed was about £125,000. How had that been expended? At the end of the year 1876 more than £58,000 had been expended in the purchase of patents, another £40,000 in round numbers in the construction of the *Belvedere* works and in providing plant and machinery, then another £3000 had been expended in other works, and £22,000 had been lost. That has got rid of the whole £125,000, with the exception of a sum of less than £2000. Then after December, 1876, the *Belvedere* works, which cost £40,000, were sold for £3000 or thereabouts, and the patents for which £58,000 odd were paid, are, in my opinion, substantially valueless. We see what was the idea entertained of the value of these patents in 1872, when one of the vendors sold a moiety of them for £600. A few months after this these patents are sold to the company for the enormous price of £55,000. Then we have this additional fact, that the working of these patents has resulted in a loss to the company of the sum of £22,000, and it has resulted also in an enormous loss connected with the sale of plant and machinery and the works erected for the purpose of carrying it on. We have also this fact, that one or two licenses have been recently issued for which no consideration has been given, and therefore it is impossible to estimate the patents as

(1) Law Rep. 2 Ch. 737.

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being of any real value. At one time I was rather impressed with the idea that the company might continue for the purpose of carrying on the business of selling licenses for the working of the patents, but on looking more minutely into the case I see that the two earlier patents have both expired, and there is this evidence of the small sum they are worth, that, even if licenses are issued at all, no consideration can be obtained for them. What then is the prospect of this company going on? If it took all this large amount of expense to start it, how could it be started again without a large amount of capital to purchase the plant and machinery necessary for carrying it on? As I said before, there is only a trifling and very remote possibility of any profit being made by granting licenses under the patents. Having regard to all these facts, I think that the circumstances are *ejusdem generis* with some at least of the circumstances referred to in the first four sub-sections of the 79th section of the Act. I therefore think that the order of the Court below is a proper order and must be affirmed.

THESIGER, L.J.:—

I agree that the order of the Vice-Chancellor must be affirmed. That order may be supported not merely on one isolated fact which may be impeached by the Appellants, but by a combination of circumstances which, taken together, seem to me to make a very strong case in favour of the order. I pass by any question arising out of the circumstances which led to the foundation of the company, although we cannot but see that the company was founded under circumstances which did not point very strongly to the probability of its being a great success. But we come to the position of that company in 1877 and 1878, and we find that position to be this: The capital entirely gone, the plant and machinery and manufacturing premises and offices of the company all sold, and nothing left that would indicate in any way that that company could be, if I may use the expression, resuscitated and made again into a going company, except the speculative prospect of something that might be made out of certain patents which, even if they were of any value, were approaching the time when they would expire. That is one circumstance, and if that circum-

stance stood alone, recollecting that here we have not to decide the case as if it was a matter coming before us in the first instance, but must dismiss the appeal unless we are satisfied that the Vice-Chancellor has been led to a wrong conclusion, I should be disposed to say that there was sufficient evidence to justify the Vice-Chancellor in coming to a conclusion that the whole foundation of the company was gone.

But there are other material facts in the case which, combined with the evidence as to the circumstances of the company, very much strengthen the position taken up by the learned Judge in the Court below. In the first place we have to look at what is the object with which this winding-up order was sought, and without in any way stating from this Bench that there is any ground for the imputations cast upon any of the directors, we cannot shut our eyes to the fact that there were circumstances connected with the origin of this company, and circumstances connected with the payment of money and shares to persons who themselves were connected with the origin of the company, which ought to be looked into, and which, when looked into, possibly may lead to the result of the recovery of a considerable amount of money for the company, and among those persons, at all events, is to be found one director against whom already an order for the refunding of money has been made. I quite agree that when a fully paid-up shareholder is seeking to wind up a company it is necessary for him to shew that there is likely to be some tangible surplus in the event of the company being wound up and its assets collected; but here I think that not only a *primâ facie* case is made for the repayment of money by the directors and promoters, but also, looking at the small amount of debt of the company, a *primâ facie* case for the existence of a surplus for the shareholders.

Another matter material to be looked at is this: How are the shareholders of this company taking this matter of the winding-up? Is it a case such as that of *In re Suburban Hotel Company* (1), where a large majority of shareholders strenuously opposed the winding up? Is it a case even like that of the *Langham Skating Rink Company* (2), where a considerable body of shareholders

(1) Law Rep. 2 Ch. 737. (2) 5 Ch. D. 669.

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down to the last moment strenuously opposed the winding-up? Not at all. It is true that at the end of the year 1877 and the beginning of 1878 many shareholders opposed the petition for winding up which was then before the Court, but in a company of this sort six months may make a great difference in the opinions of the shareholders; and when we find that not one shareholder either in the Court below or here appears to oppose this petition, while, on the other hand, we find that there is a strong body of shareholders supporting it, we cannot shut our eyes to the fact that the opposition to this petition is mainly due to the position of the directors, some of whom at all events have charges made against them. Taking, then, all those circumstances together, I cannot but come to the conclusion that the Vice-Chancellor exercised a wise discretion in making the order, and was justified in holding that under the circumstances it was just and equitable that this company should cease to exist.

The question was then raised how the costs of the appeal ought to be provided for.

JAMES, L.J.:—

We can give no further order than that which was made in *In re National Savings Bank Association* (1), that all parties except the Appellants shall have their costs out of the estate, and there will be no order as to the costs of the Appellants. We desire it to be understood that for the future, whenever an order absolute for winding up a company has been made, and that order is appealed from by the company itself, without any one else being made responsible for costs, we shall be ready to entertain an application for security for costs.

Solicitors: *E. Beall; Newman, Stretton, & Hilliard.*

(1) Law Rep. 1 Ch. 547.

In re BRIGHT'S SETTLEMENT.

C. A. 1880 Jan. 12.

Notice—Assignee in Bankruptcy—Assignment of Chose in Action—Notice to Trustee—Bankruptcy Act, 1849, *s.* 141.

A person entitled to a reversionary share of a trust fund became bankrupt in 1866. The trustees of the fund had no notice of the bankruptcy till 1878. In 1871 the bankrupt assigned his reversionary share for value to a purchaser who had no notice of the bankruptcy and who gave immediate notice of the assignment to the trustees of the fund. The reversion fell into possession in 1878.

Held, by the Court of Appeal that under the terms of the *Bankruptcy Act*, 1849, s. 141, the title of the assignee in bankruptcy must prevail against that of the particular assignee.

Re Coombe's Trusts (1) approved.

18 Ch D 382-4 s 387, 396 23 Ch D 547 352

By a settlement made in 1825 on the marriage of Mr. and Mrs. *Bright*, a fund of personal estate was settled upon trust for Mrs. *Bright* for life, and after her death for the children of the marriage. One of the children, *Michael Octavius Bright*, was born in 1832. He was adjudicated bankrupt in June 1866, and *W. J. Peirce* was appointed creditor's assignee. The bankrupt obtained his order of discharge in 1872. No notice of the bankruptcy was given to the trustees of the settlement, and they were not informed of it till September 1878. It did not appear whether the bankrupt was a trader.

On the 27th of April, 1871, *Michael O. Bright* made an absolute assignment of his share under the settlement to *William Wake*, who had no notice of the bankruptcy. *Wake* gave to the trustees immediate notice of the assignment.

Mrs. *Bright*, the tenant for life, died in August 1878, and in April, 1879, the trustees transferred the fund into Court under the Act for the relief of trustees.

A petition having been presented for the distribution of the fund, the share of *M. O. Bright* was claimed by *Wake* under the transfer to him, and by *Peirce* as assignee in bankruptcy. Vice-Chancellor *Hall* ordered payment of the share to *Wake*. The assignee appealed.

(1) 1 Giff. 91.

C. A. 1880 *In re* BRIGHT'S SETTLEMENT.

Dryden, for the Appellant:—

This case is identical with *Re Coombe's Trusts* (1). The negative words in the 141st section of the *Bankruptcy Act*, 1849, which was the Act in force at the time of this bankruptcy, prevent any alienation by the bankrupt after his bankruptcy from conferring any title, and distinguish the cases from those in which the title of the particular assignee has prevailed, as in none of them did the statutes contain similar words. The doctrine of notice depends on diligence, and it would be a hardship to hold an assignee in bankruptcy guilty of negligence for not giving notice to the trustees of a property of the existence of which he did not know. A particular assignee always can give notice, and is negligent if he does not give it.

Kenyon Parker, contrà.

As regards the hardship on assignees in bankruptcy in making them lose a property for want of giving notice when they did not know of its existence, that argument is disposed of by the whole current of authority: *In re Atkinson's Trusts* (2); *Re Barr's Trusts* (3). The case of *In re London and Provincial Telegraph Company* (4) covers the present case and follows the old authorities.

[COTTON, L.J.:—That case seems to go on the ground that there had been a transfer of a legal title for value without notice.]

The negative words in the 141st section cannot have any greater effect than the direction that the property shall vest in the assignee, which direction takes away all right to alien.

[*Lloyd* v. *Banks* (5) was also referred to.]

It is not shewn that the bankrupt was a trader, and the Act of 1849 only applies to traders.

JESSEL, M.R.:—

I do not see how the effect of the plain words of the Act can be got rid of. There is a conflict of decision, Vice-Chancellor *Stuart* having decided the question in one way in *Re Coombe's Trusts*,

(1) 1 Giff. 91.
(2) 2 D. M. & G. 140.
(3) 4 K. & J. 219.
(4) Law Rep. 9 Eq. 653.
(5) Law Rep. 4 Eq. 222; Ibid. 3 Ch. 488.

and Vice-Chancellor *Hall* the other way in the present case. The words of the Act are so stringent that it is impossible to decide in favour of the Respondent without striking them out of the section. That section not only provides that the personal estate and effects of the bankrupt and the debts due to him shall be vested in the assignees by virtue of their appointment, but goes on to say that, after such appointment, "neither the bankrupt nor any person claiming through or under him shall have power to recover the same, nor to make any release or discharge thereof . . . . but such assignees shall have the like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged a bankrupt." The present Respondent, claiming through the bankrupt by a title derived since the bankruptcy, seeks to recover a sum of money, and that is precisely what the statute negatives. The question does not depend on any doctrine of equity, but on the express words of the Act.

BAGGALLAY, L.J.:—

I am of the same opinion. It appears to me to be of no consequence whether the bankrupt was a trader or not. It is true that the Act of 1849 only applied to traders, but the Act of 1861, which extended bankruptcy to non-traders, provides by sect. 232 that so much of the Acts of 1849 and 1854 as remains unrepealed shall be construed together with the Act of 1861 as one Act. There is therefore no doubt that the 141st section of the Act of 1849 applies to all bankruptcies under the Act of 1861.

COTTON, L.J.:—

I am of the same opinion. It is unfortunate that we do not know the grounds of the decision of the Vice-Chancellor. There are, no doubt, many decisions that assignees in bankruptcy or insolvency stand in the same position as other assignees as regards the necessity of giving notice to trustees, but they are all under Acts worded differently from the Act now before us. Here we have an express enactment that neither the bankrupt, nor any one claiming under him after the appointment of assignees, shall be entitled to recover.

Solicitors: *Geare & Son; J. Whitehouse.*

C. A.
1880
Jan. 13.

In re BLYTH AND YOUNG.

Practice—Time for appealing—Rules of Court, 1875, *Order* LVIII., *r.* 9—*Order under Vendor and Purchaser Act*, 1874—*Extension of Time—Intention to appeal—Costs.*

6 Q.B.D. 118
22 Ch.D. 484
486-9
491-2
24 Ch.D. 492

The time within which an appeal can be brought from an order under the *Vendor and Purchaser Act*, 1874, s. 9, is twenty-one days.

The mere communication by an unsuccessful party to his opponent of his intention to appeal is not sufficient notice of appeal; nor, in the absence of other special circumstances, is it ground for an extension of time for appealing.

A Respondent who, after the time for appealing has expired, knowingly allows his opponent to incur expense in preparing for the appeal, without warning him of his intention to object to the appeal being heard, may be deprived of his costs.

The grounds for allowing an extension of time for appeal considered.

IN this case a summons was taken out by *Mary Kate Blyth*, the vendor of a piece of land under the *Vendor and Purchaser Act* (37 & 38 Vict. c. 78), for the purpose of obtaining the decision of the Court with respect to one of the conditions of sale.

The summons was heard by Vice-Chancellor *Hall* in Chambers on the 4th of August, 1879, when his Lordship dismissed the application and directed the applicant to pay the costs.

The vendor's solicitors obtained a certificate from the Vice-Chancellor that he did not wish to rehear the matter in Court preparatory to an appeal from his decision: and on the 6th of August they wrote to the solicitor for the purchaser a letter, in which they said:—"We have taken the initial steps for lodging an appeal," and suggested certain terms by which a continuance of litigation might be prevented.

On the 8th of August they wrote another letter, in which they said: "The appeal will come on shortly after the vacation."

The order was not perfected and entered till the 16th of November.

The appeal was actually presented on the 18th of November, 1879.

After the Long Vacation some further correspondence took

place respecting a plan of the property which had been lost, and the solicitors for the purchaser signed a consent to admit a copy of the plan on the hearing of the appeal.

When the appeal came on to be heard,

Bristowe, Q.C., and *J. Maurice Lloyd*, for the Respondent, took the preliminary objection that the appeal had been presented too late:—

The appeal ought to have been presented within twenty-one days from the refusal of the application. This is a "matter not being an action" within Rules of Court, 1875, Order LVIII., rule 9. There is no distinction in principle between an order under the *Vendor and Purchaser Act* and one under the *Trustee Relief Act*, which has been expressly decided to be within the Order: *In re Baillie's Trusts* (1). The Respondent has not done anything to mislead the Appellant, and has not bound himself by any agreement to waive the objection: therefore he is entitled to insist on the limit of time being adhered to: *McAndrew* v. *Barker* (2).

Hastings, Q.C., and *Caldecott*, for the Appellant:—

It has never been decided that an order under the *Vendor and Purchaser Act* is an order in a "matter" within the rule. But, admitting it to be so, the omission to appeal in proper time was a mere accidental mistake, and the Court ought to extend the time, especially as the point has never been decided before: *In re Baillie's Trusts*. There are special circumstances in this case to call for indulgence, for the Appellant expressly told the Respondent that she intended to appeal, and the Respondent acted upon it, and entered into an agreement as to the admission of evidence at the hearing of the appeal. A similar notice of intention has been held to be an informal notice of appeal, and has been ordered to be set down: *Little's Case* (3). No special form of notice of appeal is given in the Orders. At all events it is a ground for extending the time: *Taylor's Case* (4).

Bristowe, in reply as to costs.

(1) 4 Ch. D. 785.
(2) 7 Ch. D. 701.
(3) 8 Ch. D. 806.
(4) Ibid. 643.

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JAMES, L.J.:—

It was settled three years ago, in *In re Baillie's Trusts* (1), that an appeal from an order under the *Trustee Relief Act*, which is the same in principle as an appeal from an order under the *Vendor and Purchaser Act*, must be set down within twenty-one days. That is the law of the land; and the time cannot be extended except under special circumstances. What are the special circumstances which are alleged in this case? There was a correspondence between the solicitors of the parties, in which the solicitors of the Appellant stated that they intended to appeal; and the Appellant relied upon *Little's Case* (2) as shewing that this was sufficient. But in that case the notice was intended as an actual notice of appeal, although it was informal. I have seldom known a case in which an appeal was not threatened by the solicitor of the unsuccessful party or his clerk. But a mere suggestion that there is an intention to appeal is not sufficient. The time for appeal expired after twenty-one days, and the Respondent had then the benefit of what may be called a statute of limitations protecting him from an appeal, and the Appellant has no equity to deprive him of that advantage.

At the same time it must be observed that the Respondent was told that there was to be an appeal, and a correspondence took place about the admission of evidence on the appeal. I think he ought not to have gone on allowing his opponent to incur expense without telling him that he intended to take the objection that the appeal was too late. Therefore I think that justice requires that there should be no costs of the appeal, but that the appeal should be simply dismissed because it was not presented in time.

BAGGALLAY, L.J.:—

I am of the same opinion. It was hardly seriously contended that this case was not governed by Order LVIII., rule 9. But it was said that the Appellant expressed an intention to appeal within twenty-one days, and *Little's Case* was relied on. But in that case the circumstances were special, and the Court was of opinion that the notice, although informal, was a sufficient com-

(1) 4 Ch. D. 785. (2) 8 Ch. D. 806.

pliance with the Order, and directed the appeal to be set down on that notice. As regards the extension of time for appeal, the principle has been laid down in *McAndrew* v. *Barker* (1) by the Master of the Rolls in the following terms: "The Court has no discretionary power to deprive a litigant of any advantage given him by the General Orders, unless there has been on his part some conduct raising an equity against him;" this language, though applicable to the case then under consideration, must, I think, admit of some modification where the circumstances are of a special character, but I can find none such in the present case. In my opinion, the Respondent did not, by agreeing to admit a copy of the plan as evidence, preclude himself from taking the objection, though, as to the costs of the appeal, I agree with Lord Justice *James* that the Respondent ought to have saved the Appellant from incurring unnecessary expense, and that there ought to be no costs of the appeal.

There is one other matter to which I wish to allude. Mr. *Hastings* relied upon *In re Baillie's Trusts* (2), as shewing that if it was the first time that the particular point had been decided under the Act, the time would be extended, and he said that the rule had never been before applied to an order under the *Vendor and Purchaser Act*. But in *In re Baillie's Trusts* there was this special circumstance, that in the *Trustee Relief Act* there is a clause providing that any order made under it should have the same authority and effect, and be enforced and subject to rehearing and appeal, in the same manner as if it had been made in a suit regularly instituted in the Court. There is no such clause in the *Vendor and Purchaser Act*.

COTTON, L.J.:—

In this case it was, in fact, conceded that the appeal ought to have been brought within twenty-one days. But it was said that notice of appeal was given, though informally, and that there ought to be an extension of time. With respect to the correspondence, that took place after the twenty-one days had expired, and the only act done by the Respondent was done to prevent obstacles being thrown in the way of the Appellant in case the

(1) 7 Ch. D. 705. (2) 4 Ch. D. 785.

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appeal was heard. Therefore we are thrown back upon the actual terms of the notice; and when we look at it, it is clearly only an intimation that the Appellant intended to appeal, and therefore had taken certain steps which must be taken in case the appeal was presented. It was quite different from what was done in *Little's Case* (1), where there was an actual notice of appeal, although an informal one. Then it was said there was an agreement by both sides that there should be an appeal. I can see no evidence of anything like such an agreement. It is clear that the delay arose out of a mistake of the Appellant, who thought that she had a year in which to appeal.

As to costs, I agree with the other Lords Justices—for this reason: the correspondence took place after the twenty-one days had expired, that is, after the Respondent was in a position to say that the appeal was too late. If he had said so, the Appellant would probably not have gone on to incur further expense in the appeal. I think that is sufficient ground for refusing the Respondent his costs.

JAMES, L.J.:—

22 Ch D 97

With regard to *McAndrew* v. *Barker* (2), I wish to say that I think it was a little too strong to say that the Court has no discretionary power to enlarge the time for appealing unless there has been conduct on the part of the Respondent raising an equity against him. The Court did not intend to lay down a positive rule in every case: it was not intended, for instance, to apply to the case of inevitable accident.

Solicitors: *Rye & Eyre; Sympson, Warner, & Turner.*

(1) 8 Ch. D. 806. (2) 7 Ch. D. 705.

ESDAILE *v.* VISSER.

C. A.
1880
Jan. 13.

[1876 E. 120.]

Arrest under Debtors Act, 1869—*Form of Order—Attachment—Discretion of Judge.*

A man who makes default in payment of a sum of money which he has been ordered by the Court to pay, cannot be attached for contempt, but must be proceeded against under the *Debtors Act*, s. 5.

But where a Judge made an order for the committal of a defaulting party under the *Debtors Act*, and the order was drawn up by the Registrar in the presence of the debtor in the form of an attachment for contempt, from which the debtor appealed, the Court dismissed the appeal and directed the order to be rectified.

As a general rule, when a Judge has been judicially satisfied of the ability of a debtor to pay the amount in which he has made default, the Court of Appeal will not interfere with his conclusion.

THIS was an appeal from an order of Vice-Chancellor *Hall*.

The action was brought against several Defendants, of whom *Decimus Ilderton* was one, to enforce the payment of tithes claimed by the Plaintiff from the occupiers of property in the city of *London*. At the hearing of the action, judgment was given against the Defendants with costs, which on taxation amounted to £148 12*s*. A subpœna was issued against *Ilderton* for payment, and on default the Plaintiff obtained an order from the Vice-Chancellor on the 13th of March, 1879, that *Ilderton* should pay the sum of £8 monthly till the whole demand should be satisfied; the first instalment to become due at the end of a month from the date of the order.

Ilderton having failed to pay some of the instalments, the Plaintiff served notice of motion under the *Debtors Act*, 1869, s. 5, that the Defendant should be committed to prison for the term of six weeks or until he should pay the arrears of his instalments, and three guineas costs.

On the 5th of August, 1879, the Vice-Chancellor, being satisfied that *Ilderton* had the means to pay the sum in arrear, made an order in terms of the notice of motion. On that occasion *Ilderton* presented himself for oral examination, but the Vice-Chancellor

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considering that the facts were sufficiently stated in the affidavits, did not think fit to have him examined.

On the 9th of August *Ilderton* gave notice of appeal from this order.

The order of the 5th of August, 1879, as drawn up by the Registrar, was not in the form given in the schedule to the *Debtors Act*, but as follows: "It appearing to the satisfaction of the Court that the said Defendant *H. D. Ilderton* has made default in payment of the said sum of £24 as directed by the said order dated 13th March, 1879, it is ordered that an attachment be issued against the said Defendant *H. D. Ilderton* for his contempt in not having paid the said sum of £24; but the order is not to be enforced until after the 18th of August, 1879; and it is ordered that the Defendant *H. D. Ilderton* pay to the Plaintiff his costs of this application, including his costs of such attachment, to be taxed," &c.

The Registrar stated that this was the form usually adopted in the Chancery Division, and that the writ of *ca. sa.* to be issued under the order would limit the imprisonment to six weeks. The Defendant was present at the drawing up of the order, and did not object to the form of it.

A. Young, for the Appellant:—

The order as drawn up by the Registrar cannot stand. It is an order for attachment for contempt, which cannot now be issued for non-payment of a sum of money: *Hewitson* v. *Sherwin* (1). It is also erroneous in not confining the costs to three guineas. It is true that the Appellant was present when the order was drawn up, but it was not his duty to see that it was correctly drawn. No one can be imprisoned under an informal order. The evidence before the Vice-Chancellor as to the power of the Appellant to pay the money was insufficient. He ought to have allowed the Appellant to be examined in explanation of the affidavits.

Maclean, for the Plaintiff:—

The order made by the Vice-Chancellor was in the proper form, and it was no fault of the Plaintiffs if it was drawn up erroneously.

(1) Law Rep. 10 Eq. 53.

The Defendant was present when it was drawn up, and cannot now object to its form.

With respect to the merits, the Judge was satisfied by the evidence that the Defendant had the means of payment. He had a judicial discretion on this point; and there is no appeal from his conclusion. But if the Court will reopen the question, the evidence is quite sufficient to satisfy the Court.

Young, in reply.

JAMES, L.J.:—

There has been a mistake in the Registrar's office as to the form of the order. It ought to have been drawn up as it was made by the Vice-Chancellor, and it must now be rectified. The Appellant was present when the order was drawn up, and he might have applied to the Vice-Chancellor to set it right.

With respect to the evidence of the Appellant's ability to pay the amount demanded from him, we see no reason to alter the order on that ground. When all the materials for coming to a decision on that point have been before the Judge and he has applied his mind to them, it would require an overwhelming case to induce the Court of Appeal to differ from the Judge if he says he is satisfied of the debtor's ability to pay. The mischief would be enormous of encouraging appeals in such cases. There is nothing in this case to induce us to do so. Without laying down an inflexible rule, yet as a general rule, I am of opinion that the Court of Appeal ought not to interfere with the conclusion of the Judge of first instance when he says that the ability of the debtor to pay the debt has been made out to his satisfaction. The order must be drawn up in accordance with the *Debtors Act*, and must be affirmed. But as there has been a common mistake, there will be no costs of the appeal.

BAGGALLAY and COTTON, L.JJ., concurred.

Solicitors: *Ilderton; Winter, Williams, & Co.*

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Ex parte EVANS. *In re* BAUM.

Liquidation Petition—General Meeting of Creditors—Voting—Proxy—Creditor present but not desiring to Vote—Removal of Trustee—Vote by Creditor who has sold his Debt—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 16, *sub-ss.* 6, 7, 8; *s.* 80, *sub-s.* 8—*Bankruptcy Rules*, 1870, *rr.* 85, 86, 269, 271, 273, 293, 304, 305, 307.

A creditor, who is present at a general meeting of creditors under a liquidation petition, cannot be considered as present on behalf of another creditor for whom he holds a proxy, notwithstanding the fact that the proxy is on the file of proceedings, unless he has done some act to shew that he intends to be present on that occasion on behalf of his principal as well as on his own behalf.

Ex parte Orde (1) distinguished.

Whether the principle of that decision applies to any meeting of creditors held after the registration of liquidation or composition resolutions, *quære.*

The appointment of a proxy under the *Bankruptcy Act* and Rules only confers on the person so appointed an authority to represent his principal; it does not necessarily follow that he in fact represents his principal on all subsequent occasions when he is present at a meeting, unless he would have no right to be present in any other capacity.

The fact that a creditor who has signed a notice summoning a general meeting for the purpose of removing the trustee, and who has voted at the meeting in favour of a resolution for removing the trustee, had previously sold his debt to another creditor, will not invalidate the notice or the resolution.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

On the 1st of September, 1876, *John Baum* filed a liquidation petition. His creditors resolved on a liquidation by arrangement, and appointed *T. H. Cooper* trustee.

On the 20th of June, 1879, notice was given, under rule 305 of the Bankruptcy Rules, 1870, by *Alexander* and *Henry Isaacs*, two of the creditors who had proved their debts in the liquidation, with the concurrence of other creditors, who professed to be creditors for more than one-fourth in value of the creditors who had proved their debts, summoning a general meeting of the creditors to be held on the 1st of July, 1879, for the purpose (*inter alia*) of removing *Cooper* from his office as trustee, and appointing another trustee in his place. The notice was signed by (among other

(1) Law Rep. 6 Ch. 881.

creditors) *A.* and *H. Isaacs; G. A. Ledebore; Oak, Simpson, & Co.;* and *Moore Brothers.* The meeting was held on the 1st of July, and resolutions, removing *Cooper* and appointing another trustee in his place, were passed by a majority in value of the creditors whose names were entered in the list taken of creditors present at the meeting in person or by proxy. The registration of the resolutions was opposed by *John Evans* and some other dissentient creditors on several grounds, two only of which were ultimately insisted upon in the Court of Appeal. These two objections were 1. That the meeting had not been summoned in conformity with the *Bankruptcy Act* and Rules. It appeared that in 1877 *A. Isaacs* had purchased the debts of *Ledebore; Oak, Simpson, & Co.;* and *Moore Brothers,* but their proofs were still on the file in their own names. *Cooper* had instituted proceedings against *Isaacs* in relation to the debtor's estate. 2. That a Mr. *Scrivener,* who was a creditor for £105, and who was also the duly appointed proxy (the proxy being on the file of proceedings) for Mrs. *Jane Simpson,* a creditor for £5473, was actually present at the meeting, but neither he nor Mrs. *Simpson* was entered in the list of creditors present in person or by proxy at the meeting. If Mrs. *Simpson* had been entered as present there would not have been the proper statutory majority in favour of the resolutions. *Scrivener* made an affidavit, in which he said that he was present at the meeting, and that, though he had always acted as proxy for Mrs. *Simpson,* he had no instructions from her to take any part in the proceedings of the meeting. He said that he did not attend the meeting with the intention of voting, and did not vote upon the resolutions passed, either for himself or for Mrs. *Simpson,* but he attended merely to watch the proceedings, and upon being requested to vote he stated to the meeting that he declined to do so. In cross-examination he said that at the meeting he was asked by Mr. *Roberts,* the solicitor of Messrs. *Isaacs,* if he was going to vote, and he answered that he did not intend to vote.

The Registrar overruled all the objections, and registered the resolutions. The opposing creditors appealed.

Winslow, Q.C., and *R. Vaughan Williams,* for the Appellants:—

These creditors who had sold their votes to *Isaacs* ought not to

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be counted as having signed the notice summoning the meeting, and their votes ought not to be counted in the majority in favour of the resolution. They were no longer creditors, and had ceased to have any interest in the matter, and *Isaacs* had a strong personal interest in getting *Cooper* removed, so as to put a stop to the proceedings which *Cooper* had taken against him. Even if the votes of these creditors, if excluded, would not actually turn the scale the other way, yet the want of *bona fides* taints the whole proceeding: *Ex parte Baum* (1).

Every creditor who is actually present at a meeting and has not withdrawn his proof must be counted as present for the purpose of ascertaining the majority of votes: *Ex parte Pooley* (2); *Ex parte Orde* (3); Bankruptcy Rules, 1870, r. 273. The same rules must apply to all meetings of creditors, with the exceptions mentioned in sect. 21. Therefore *Scrivener* must be taken to have been present, both on his own behalf and on behalf of Mrs. *Simpson*, and the result will be that the resolutions were not carried by a sufficient majority.

[JAMES, L.J.:—A creditor could not withdraw his proof under rule 273 as he could at the first meeting.]

It might be taken off the file.

[JAMES, L.J.:—That could not be done at the meeting.]

E. Cooper Willis, and *H. Reed*, for the assenting creditors:—

The evidence of *Scrivener* shews that he took no part in the proceedings; he was only watching them. In *Ex parte Orde* the creditor had taken an active step by handing in his proof at the meeting. That was the foundation of the decision, which applies only to a first meeting or an adjournment of it. Rule 273 only applies to a first meeting. After registration of the resolutions a proof cannot be withdrawn without an order of the Court. *Scrivener* did all he could to shew that he did not intend to take any part in the proceedings. Why should a man be held to have been present for the purpose of affecting the votes when he says, I intend to take no part?

(1) 7 Ch. D. 719. (2) Law Rep. 5 Ch. 722.
(3) Law Rep. 6 Ch. 881.

Winslow, in reply:—

[JAMES, L.J.:—Suppose Mrs. *Simpson's* proxy had been revoked?]

If notice of the revocation had been given to the trustee, *Scrivener's* vote on her behalf would have been bad. If a proxy is not shewn to have been revoked, it must be considered as still subsisting. Rule 273 is not confined to a first meeting. The effect of a proxy is to place the person thereby nominated as proxy in the same position as the creditor who appoints him: *Bankruptcy Act*, 1869, s. 80, sub-s. 8; Bankruptcy Rules, 1870, rr. 85, 86; Bankruptcy Forms, 1870, Nos. 32, 33. The principle of *Ex parte Orde* (1) applies. In that case the persons who were considered as present held proxies. In the present case the proxy was on the file of proceedings, and the result of this was that whenever the person nominated as proxy appeared at a meeting he appeared on behalf of his principal. Her proxy could have been taken off the file.

JAMES, L.J.:—

The first objection is that some of the votes constituting the majority were those of persons who had sold their debts to *Isaacs*, who had a personal interest in calling a meeting to remove Mr. *Cooper*, and that therefore their votes ought not to have been reckoned. I think there is nothing in that objection, for this is not a case in which the majority were voting for the purpose of binding the rights of the minority.

The next objection is a more serious one, as to the application of *Ex parte Pooley* (2) and *Ex parte Orde*, viz., what is to be done with persons who are present at a meeting but who do not sign the resolutions as voting in favour of them? We held in *Ex parte Orde* that such persons must be considered as present at the meeting and be reckoned in the total number of creditors present and voting, unless they withdraw their proofs as provided by rule 273. Without saying how far that decision would apply to Mr. *Scrivener* personally with regard to such a meeting as this, it appears to me quite clear that the principle cannot apply to

(1) Law Rep. 6 Ch. 881. (2) Law Rep. 5 Ch. 722.

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the case of a creditor who is represented by another creditor as his proxy. I am of opinion that the principle does not apply to the case of a person who is said to have been present in that way. Such a person is not personally present, and in what way does it appear that the proxy remained in force? The creditor who is present might intend to be present on his own behalf, and not on behalf of his principal. Mr. *Scrivener* has done nothing to shew that he was present on behalf of Mrs. *Simpson*, who had given the proxy, and he had a right to be present on his own behalf. There can be no difficulty in taking a list of the persons present, and inquiring of them for whom they appear, and it ought to be stated in the list for whom the persons present and holding proxies appear. If a creditor who is present does not say that he appears as proxy for some one else, his principal cannot be taken to be present. The names of the proxies would not appear in the list; it would only shew the names of the principals who are present either personally or by proxy. The principal might well have revoked his proxy, or he might have said, I do not wish you to be present for me at this particular meeting. I think there is no evidence that Mr. *Scrivener* was present at this meeting as proxy for Mrs. *Simpson*, and consequently she cannot be counted in estimating the majority of votes.

BAGGALLAY, L.J.:—

I entirely concur, and I only desire to add that I wish to keep my mind open on the question whether the principle of *Ex parte Pooley* (1) and *Ex parte Orde* (2) applies at all to meetings held after the registration of liquidation or composition resolutions.

COTTON, L.J.:—

If I understand the facts aright there will be the requisite majority in value, even if Mr. *Scrivener* is counted as present at the meeting, unless Mrs. *Simpson*, for whom he held a proxy, is also to be taken into account as present. I agree with the rest of the Court that Mrs. *Simpson* cannot be counted as present, but I express no opinion on the question whether Mr. *Scrivener* ought to have been treated as present on his own behalf. Can it be said

(1) Law Rep. 5 Ch. 722. (2) Law Rep. 6 Ch. 881.

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that Mrs. *Simpson* was present at the meeting? She certainly was not personally present. Was she present by proxy? The proxy only conferred an authority on Mr. *Scrivener* to appear and act for her; it did not necessarily compel him to do so on all occasions. I think that, without revoking the proxy, she might have told him not to attend a particular meeting on her behalf. The proxy did not put him in her place for all purposes; it only gave him an authority to act on her behalf. We must give a reasonable construction to sub-sect. 8 of sect. 80. The practice is to put down in the list of creditors present the names of the principals; if a principal is treated as present by proxy the name of the proxy would not appear in the list. In my opinion it does not necessarily follow that because Mrs. *Simpson's* proxy was present at the meeting she was brought there by representation. If he could only have been present at the meeting as her proxy it would have been a wholly different matter. But, when he had a right to be present on his own behalf, it would be wrong to hold that he was present also on behalf of Mrs. *Simpson*, when he had done no act to shew that he intended to be present in that character.

Solicitor for Appellants: *John Evans.*
Solicitor for Respondents: *W. H. Roberts.*

Ex parte DUCE. *In re* WHITEHOUSE.

C. A. 1879 C. J. B. *July* 21. C. A. 1880 *Jan.* 15.

Liquidation Petition — Creditors' Meeting — Voting — Blank Proxy sent by Creditor to Debtor's Solicitor — Implied Authority to insert Name of Debtor's Solicitor — Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 80, *sub-s.* 8—*Bankruptcy Rules*, 1870, *r.* 85—*Bankruptcy Forms*, 1870, *Nos.* 32, 33.

A creditor of a liquidating debtor, who signs a proxy in blank and sends it to his solicitor, who forwards it to the debtor's solicitor without any express instructions as to the use to be made of it, thereby confers on him an implied authority to fill up the proxy with his own name and to vote on his behalf.

ON the 19th of March, 1879, *Henry Whitehouse*, a publican, filed a liquidation petition in the *Walsall* County Court. The first

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meeting of the creditors was held on the 15th of April, when it was resolved to accept a composition of 5*s.* in the pound. On the 19th of April, Mr. *Joseph Smith*, the solicitor of *J. T. Duce*, one of the creditors, wrote to Mr. *H. Jackson*, the debtor's solicitor, inquiring what had been done at the meeting. On the 23rd of April, *Smith* received a reply from *Jackson*, telling him of the resolutions which had been passed. The same day *Smith* wrote again to *Jackson*: "Will you kindly send me form of proof of debt, as the one sent to my client, Mr. *Duce*, has been mislaid?" On the 24th of April *Jackson* replied: "As requested, I herewith send you form of proof for your client Mr. *Duce*, which you will oblige by letting me have by return of post. You are aware that the second meeting of creditors is fixed to be held on the 29th of April to confirm the resolutions passed on the 15th inst." The form thus sent was according to No. 32 of the Bankruptcy Forms, 1870, and it had a form of proxy at the foot. *Duce* made the affidavit of proof and signed the form of proxy, but did not insert the name of any person as his proxy. He left the form thus signed with his solicitor, who returned it to *Jackson* on the 28th of April. The second meeting of the creditors was held on the 29th of April, and was adjourned to the 6th of May, in order that the chairman might make some inquiries as to the debtor's estate. At the adjourned meeting on the 6th of May it was resolved to accept a composition of 7*s.* 6*d.* in the pound. At this meeting the proof of *Duce* was produced and was admitted by the chairman. The Registrar gave leave to issue notices of another meeting to confirm the resolutions passed on the 6th of May. This meeting was held on the 20th of May, when the resolutions were confirmed. At this meeting *Jackson* filled up the blank in *Duce's* proxy with his own name, and voted on *Duce's* behalf in favour of the confirmation of the resolutions. The confirmation would have been carried without *Duce's* vote. *Duce* had, on the 15th of May issued execution on a judgment which he had obtained against the debtor. *Duce* opposed the registration of the resolutions. The Registrar intimated an opinion that he was precluded by his proxy's vote in favour of the resolutions from opposing the registration, and *Duce* then applied for an order to remove the proxy from the file of proceedings and to erase his name from the

list of creditors voting. *Duce* made an affidavit in which he said that his intention in leaving the proxy in blank when he signed it was that it might be filled up with the name of his solicitor or of his clerk, whichever should attend the meeting of creditors, but that he never had any intention of appointing *Jackson* as his proxy. Mr. *H. E. Crisp*, a clerk of *Smith*, who had the management of the matter on behalf of *Duce*, made an affidavit, in which he said that, inasmuch as neither he nor *Smith* could attend the meeting on the 29th of April, he sent *Duce's* proof and proxy to *Jackson* on the 28th of April with a letter, in which he said, "Be good enough to inform me of the result of the meeting to-morrow." He also said that he had no intention of authorizing *Jackson* to fill up or use the proxy. Evidence was also adduced with the view of proving that, even if *Duce* had originally authorized *Jackson* to fill up and use the proxy, the authority had been withdrawn before the 20th of May. The Registrar refused the application, and registered the resolutions. *Duce* appealed to the Chief Judge from the refusal of the application to remove the proxy from the file, and to erase his vote. The appeal was heard on the 21st of July, 1879.

Hugo Young, for the Appellant:—

The proxy was filled up without any authority from the Appellant, and for the purpose of stopping him from opposing the registration of irregular resolutions. *Ex parte Lancaster* (1) only decides that, if a proxy is signed in blank, it may be filled up on a verbal authority; it is not a decision that a proxy signed in blank may be filled up by any one without any authority, verbal or otherwise.

Finlay Knight, for the debtor, was not called on.

BACON, C.J.:—

There is no ground whatever for the appeal, for the facts are plainly these: Mr. *Duce*, through his solicitor, desires to be informed of what is being done in the insolvency of *Whitehouse*. His solicitor is in correspondence with Mr. *Jackson*, the debtor's

(1) 5 Ch. D. 911.

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solicitor, and he is informed that there is going to be a meeting of creditors on a particular day. The original form of proof sent to *Duce* having been mislaid, Mr. *Crisp*, a clerk of his solicitor, desires to have another form sent to him. Upon the receipt of that he transmits it to Mr. *Duce*, and after he has signed it he returns it to Mr. *Jackson*, in order that it may be used at that meeting of creditors of which he has had notice, and at which he knows that resolutions must or may be proposed. He sends him a proxy signed in blank in order that he may attend at that meeting, if Mr. *Crisp* did not. The notion of *Duce* in signing that proxy was, it is stated, that his solicitor or a clerk of his should go to the meeting. That may have been so, but it was not communicated to Mr. *Jackson*. The proof of the debt and the blank proxy are sent by Mr. *Crisp* to Mr. *Jackson*, that they may be used by Mr. *Jackson* at that meeting, which he knows is to take place on the day named. Where is the novelty? Upon what ground can I allow any complaint to be deduced from that? The Court of Appeal has said that a blank proxy may be properly filled up by the person to whom it is entrusted. Here the proxy was entrusted to Mr. *Jackson*. I find that the purpose for which it was sent to *Jackson* was known to *Crisp*, and was recognised by him, and I cannot treat it as otherwise than a plain authority to Mr. *Jackson* to fill up the blank proxy with his own name in order that he might vote for *Duce* at the meeting which was about to take place, and of which the parties had had full notice. There is no ground for the appeal, and it must be dismissed.

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From this decision *Duce* appealed. The appeal was heard on the 15th of January, 1880.

Winslow, Q.C., and *Hugo Young*, for the Appellant:—

It has never yet been decided that a creditor who has voted for liquidation or composition resolutions cannot oppose their registration if they have been passed irregularly. *Jackson* voted contrary to the Appellant's intention. The Appellant never gave him any authority to insert his own name as his proxy. The case is not like *Ex parte Lancaster* (1). There the creditor had given

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the blank proxy to his own solicitor, and had directed him to attend the meeting, and, if necessary, to vote. If the debtor's solicitor is entitled to insert his own name in blank proxies, the result will be to give the control of the proceedings to the debtor. This will lead to great abuses. Here *Jackson* did not insert his own name until he wanted to stop the Appellant's execution. A proxy confers the right to receive dividends for the creditor, unless that right is expressly excluded: *Bankruptcy Act*, 1869, s. 80, sub-s. 8; Bankruptcy Rules, 1870, r. 85; Bankruptcy Forms, 1870, Nos. 32, 33.

[Mr. *Pepys*, the Registrar in Court, referred to the file of proceedings, and said that the Appellant's proxy excluded the right to receive dividends.]

Finlay Knight, for the debtor, was not called on.

JAMES, L.J.:—

I am of opinion that the decision of the Chief Judge, affirming as it did that of the Court below, cannot be interfered with. The Appellant's vote would have had no effect whatever on the statutory majority. It appears to me that when his proof and proxy reached the hands of Mr. *Jackson*, the debtor's solicitor, it was for the purpose of their being used by him in the ordinary way. He says that he intended the blank in the proxy to be filled up with the name of his own solicitor or that of his clerk. But that cannot affect the conclusion that the document was intended to be used in the ordinary way in which such things are used, that is, for voting at the meeting. The very object of sending out proxies by the debtor's solicitor is to obtain friendly votes. If a man will sign a proxy in blank, it is his own fault; he should be careful not to do so. I cannot differ from the decision on this point. Then the question is, are the subsequent circumstances sufficient to shew that the authority to use the proxy had been revoked before it was used? I cannot, upon the evidence, come to the conclusion that it had. It would be very dangerous to allow proceedings of this kind to be reopened after other people have voted on the footing of the regularity of the proxies. People should take care not to part with blank proxies.

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BAGGALLAY, L.J.:—

Having regard to the circumstances under which the blank proxy reached the hands of Mr. *Jackson*, I am of opinion that an authority was given to him to fill up the blank with his own name or the name of any other person, and to use the proxy for the ordinary purpose of voting at the meeting. And I cannot see anything in what happened subsequently which amounts to a revocation of that authority.

COTTON, L.J.:—

I agree with the other members of the Court in thinking that, having regard to the way in which the blank proxy was signed by the Appellant and given by him to his own solicitor, and by him sent to Mr. *Jackson*, the debtor's solicitor, there was an implied authority to him to fill up the blank, and to use the proxy for the only purpose for which it could have been intended. And, upon the evidence, I think that that authority was not put an end to or revoked.

Solicitors for Appellant: *Walker, Son, & Field*, agents for *Joseph Smith, Wednesbury.*

Solicitors for Debtor: *E. Doyle & Sons*, agents for *H. Jackson, West Bromwich.*

C. A. 1879 FRY, J. *March* 3, 4, 5, 8, 10, 11, 12, 15. C. A. 1880 *Jan.* 16, 17, 19, 20.

ORR EWING & CO. *v.* JOHNSTON & CO.

[1877 E. 56.]

Trade-mark—Imitation—Injunction—Name acquired in Market—Deception of ultimate Purchaser—Onus of Proof—Use of different Names for the same Class of Goods—Evidence—Admissibility—Books of Registrar of Trade-marks.

If one trader appropriates a material and substantial part of a trade-mark which belongs to another trader he is bound to use such precautions as to avoid the reasonable probability of error and deception, and the *onus* is on him to shew that purchasers of the goods will not be deceived.

If the goods of a trader have acquired in the market a name derived from a part of the trade-mark which he affixes to them, a rival trader is not entitled to use a ticket which is likely to lead to the application of the same

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name to his goods, even though that name is not the only name by which the goods of the first trader have been known, or though it has been always used in conjunction with some other words.

Where a trader has a right to a trade-mark on goods sold in a foreign market, an injunction will be granted to restrain the export of goods under another trade-mark which may deceive the ultimate purchasers, although it would not deceive Englishmen or the dealers in the foreign market.

Where a trader has innocently adopted a trade-mark which is calculated to deceive by its similarity to another person's trade-mark, his continuing to use it after complaint has been made is strong evidence of fraud.

Injunction against the use of trade-mark by Defendant was made general, although the Plaintiff had never used his trade-mark except in the Indian market.

The books of the Registrar of Trade-marks which shew marks the registration of which has been refused, are not evidence that these marks are *publici juris*.

The judgment of *Fry*, J., affirmed.

THIS action was brought to restrain the Defendants from imitating the Plaintiffs' trade-mark.

The Plaintiffs had for some years carried on business in *Glasgow* and elsewhere as dyers and merchants of Turkey red yarn. Their business chiefly consisted in the dyeing and exporting of Turkey red yarn and other fabrics to the *East Indies*, the borders of the *Red Sea*, and the east coast of *Africa*. They sold their goods to merchants for export, and they also themselves consigned their goods to agents of their own in *India* and elsewhere for sale. The Plaintiffs' Turkey red yarn was made up in bundles of 5 lbs. each, which were enclosed in two paper wrappers, and the bundles were enclosed in bales, each of which contained sixty bundles. On the outside wrapper of the yarn which they sent to *India* the Plaintiffs affixed an oval-shaped ticket. The ground of this ticket was white, and it was surrounded by an ornamental border of red and gold. Inside the border was an oval-shaped red line, and between that line and the border were printed in red letters the words "*Archibald Orr Ewing & Co., Levenbank Works.*" Inside the red line was an egg, printed in gold, with the words "trade mark" printed across it in white letters, and under the egg were the words, printed in red letters, "Dyed yarns, *Glasgow.*" This ticket was known as the egg ticket. The inner wrapper was of blue or grey paper. When the Plaintiffs shipped their yarn to their own agents in *Bombay* they placed at one end of the inner

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wrapper a ticket in the shape of a right-angled triangle, with the base uppermost and the apex pointing downwards. This ticket was glazed, the ground of it being green. Under the middle of the base was a golden crown. On each side of the crown was a golden elephant, with its head turned away from the crown, and suspended from the two elephants was a golden banner which nearly filled the space between the crown and the apex of the triangle. On the banner were printed the words (in old English letters) "Prime Turkey Red," the name of the Plaintiffs' firm in Guzerathi characters, and the word "*Levenbank*" in old English letters. This was the ticket the imitation of which was complained of in this action, and was referred to in the proceedings as Ticket "A." It was introduced by the Plaintiffs in the year 1850, and had been used by them on the yarn which they consigned to their agents in *Bombay* ever since. The egg-shaped ticket was introduced in 1865. On the inside wrapper of the yarns which the Plaintiffs sold to merchants for exportation to the *Bombay* market they placed a different ticket, which had two peacocks on it instead of two elephants. The Plaintiffs did not themselves ship their yarns to *Aden* or to *Madras*, but they sold them to merchants for exportation to both those places. On the outside wrapper of the yarns sold for exportation to *Aden* they placed the egg ticket, and on the inside wrapper the two-elephant ticket. On the outside wrapper of the goods which they sold for exportation to *Madras* they placed the egg ticket, and on the inside wrapper they placed such a special ticket as the merchant to whom the goods were sold desired.

The Defendants were general merchants trading to *India*. They had exported to *Aden* and *Bombay* some Turkey red yarn made up in bundles similar to those of the Plaintiffs, that being the mode in which such goods were always made up. In the year 1875 the Defendants commenced using a ticket which was the principal subject of complaint in this action. On the outside wrapper of their yarn was placed a rectangular ticket of a red colour, on which was printed in gold the figures of the goddess *Minerva* and a tiger. The goddess had in one of her hands a shield, on which was the figure of a Hindoo goddess called "*Gunputty*," a sitting figure with an elephant's head, under which were

the words "Trade Mark." The ticket complained of in the action was placed on the inner wrapper. It was of a similar shape and colour to the Plaintiffs' two-elephant ticket (that being the shape and colour commonly used in the trade), and it also had two golden elephants and a golden banner upon it. But it differed in several respects from the Plaintiffs' ticket. In the centre, in place of the crown, was the "*Gunputty*" printed in gold. On each side of the "*Gunputty*" was an elephant. The elephants had their heads turned towards the "*Gunputty*," and each elephant had a howdah on his back with a man in it, whereas the Plaintiffs' elephants had nothing on their backs. The Defendants' banner (like the Plaintiffs') nearly filled the space between the "*Gunputty*" and the apex of the triangle, though it was of a somewhat different shape, because the "*Gunputty*" was larger than the Plaintiffs' crown. On the banner were printed these words in ordinary English letters, "Prime Turkey Red. *R. Johnston & Co., London.*" This ticket was referred to in the proceedings as Ticket "B."

The figure "*Gunputty*" had been long used by the Defendants as their trade-mark on goods exported to *Bombay*. The account given by them of the adoption of the ticket complained of was as follows:—In 1875 they received an order for Turkey red yarn, which they had never before dealt in, and they accordingly inquired about the ordinary character of the label used for such goods. Ultimately they cut out a triangular piece of white paper, in the middle of which they pasted their figure of "*Gunputty*," and wrote the name of their firm underneath. This they took to an engraver with general directions to put in some animals and to make a suitable ticket, and he sketched in the elephants and banner, and the ticket was eventually engraved in that form. The ticket was first used by the Defendants in May, 1875. On the 29th of November, 1875, the Plaintiffs' solicitor wrote to the Defendants' solicitor threatening legal proceedings unless an undertaking was given within three days not to use the ticket.

The action was commenced on the 22nd of May, 1877. The Plaintiffs by their statement of claim said that their two elephant ticket was their trade-mark, and that it had been known ever since its introduction as the "Elephant Ticket," or "Two Elephant Ticket," and that the yarn to which it was affixed had become

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widely known, especially in the Indian and African markets, as "*Elephant Yarn*," and had acquired a great reputation under that name. They alleged that the Defendants' ticket was calculated to deceive purchasers into the belief that their goods were those of the Plaintiffs. And the Plaintiffs claimed an injunction and other consequential relief.

By their statement of defence the Defendants denied that the two elephant ticket was the property of the Plaintiffs. The Defendants also said, "Several other firms and individual traders besides the Plaintiffs and Defendants use, and have in some cases for at least fifty years used, upon or in connection with Turkey red yarn or Turkey red piece goods of their manufacture or merchandise, labels or trade-marks of which the figure or figures of one or more elephants is or are a distinctive and material feature. Some of such labels are triangular, others square in shape. The greater number of the labels used upon or in connection with Turkey red yarn and piece goods are printed in green and gold. The Defendants submit that the triangular shaped label, and also the figure or device of an elephant, are respectively, as far as regards the user thereof upon or in connection with Turkey red yarn, things *publici juris*." The Defendants also denied that the Plaintiffs had by the user of any label, trade-mark, or otherwise, acquired the exclusive right to use the figure of an elephant as a part of any label or trade-mark to be placed upon or connected with Turkey red yarn.

It appeared that the Plaintiffs had applied for the registration of their two elephant ticket under the *Trade Marks Registration Act*, 1875, but their application was refused by the Court of Appeal: *In re Orr Ewing's Trade-Marks* (1). They appealed to the House of Lords, who (after the hearing of the present case by *Fry*, J.) reversed the decision of the Court of Appeal (2). The Plaintiffs' two peacock ticket had been registered under the Act, and the "*Gunputty*" figure had been registered as the Defendants' trade-mark. The evidence at the trial shewed (as the Court held) that the Plaintiffs' yarn had become exclusively known in the *Bombay* market as "*Bhé Hathi*" (*i.e.*, two elephant) yarn, in the first instance as "*Crawford's Bhé Hathi*" yarn, and afterwards as

(1) 8 Ch. D. 794. (2) 4 App. Cas. 479.

"*Graham's Bhé Hathi*" yarn, the Plaintiffs' agents at *Bombay* having been at first Messrs. *Crawford*, and afterwards Messrs. *Graham & Co.* The evidence also shewed that the Defendants' ticket would not deceive the merchants in *Bombay* who were in the habit of purchasing the Plaintiffs' yarn, but many of the witnesses expressed an opinion that it would be likely to deceive the ultimate purchasers of the yarn, *i.e.*, the native weavers in the country. There was no evidence of any one having been actually deceived. In the opinion of the Court it was not proved that any tickets (except the Plaintiffs') bearing the device of two elephants had become generally known in the *Bombay* market.

The action came on for trial before Mr. Justice *Fry* on the 3rd of March, 1879.

North, Q.C., and *H. A. Giffard*, for the Plaintiffs:—

The Defendants say that so many people have used elephants in connection with yarn, that it is now impossible for any one to to have a distinctive mark of which an elephant or any number of elephants forms or form part. But that is not the real issue of *publici juris*. The real issue is as to the use of a specific ticket in a specific market as applied to a particular kind of yarn. The question is, whether what the Defendants have done is calculated to deceive; if it is, the Plaintiffs are entitled to succeed: *Wotherspoon* v. *Currie* (1); *Edelsten* v. *Edelsten* (2).

[FRY, J.:—Your evidence goes to shew that the Defendants' ticket would not deceive the dealers in the different markets to which the yarn is exported. But I feel great difficulty in forming any opinion what would be the effect on the minds of the natives up the country in *India*, or in *Arabia*, or *Abyssinia*. What evidence is there on which I can rely that the ultimate purchaser is likely to be deceived? There is no evidence of actual deception.]

Ford v. *Foster* (3) shews the distinction between the dealer and the ultimate purchaser. In that case there was no evidence of actual deception of the ultimate purchasers; the Court assumed that the probable result of what had been done would be to deceive them. Just so here, our yarn has become known, from the two

(1) Law Rep. 5 H. L. 508. (2) 1 D. J. & S. 185.
(3) Law Rep. 7 Ch. 611, 624.

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elephants on our ticket, as "*Bhé Hathi*," and it must be assumed that the Defendants' yarn is likely to be called by the same name. The question is, not what would be the effect if the two tickets were placed side by side, but what is likely to be the effect of the Defendants' ticket: *Seixo* v. *Provezende* (1). That case also shews that if a manufacturers' goods have, from the mark which he has used, become known in the market by a particular name, a rival trader is not entitled to adopt any mark which will cause his goods to bear the same name in the market (2).

T. Aston, Q.C., and *J. Cutler*, for the Defendants:—

The question is whether the Defendants have in a legitimate way endeavoured to obtain a share of the trade in this yarn in *Bombay* and *Aden*, or whether they have in any way represented, or knowingly done anything which will enable other persons to represent, their yarn to be the Plaintiffs'. But the Defendants are only responsible for a fraud which is the natural result of their own acts. And if the Plaintiffs rely on fraud they must allege and prove it distinctly and specifically: *Singer Manufacturing Company* v. *Wilson* (3); *Webster* v. *Power* (4). If the Defendants *bonâ fide* attempted to distinguish their ticket from the Plaintiffs' there would be no fraud. When the Defendants first attempted to obtain a share of the trade in the *Bombay* and *Aden* markets the state of things was this: tickets of a triangular shape and printed in green and gold were in common use, and so were crowns, banners, and elephants, and the Plaintiffs had deliberately chosen this particular combination of a crown, a banner, and two elephants. The Defendants have not taken that combination. The evidence does not shew that the name "*Bhé Hathi*" *simpliciter* was ever associated with the Plaintiffs' yarn; their yarn was always known as "*Crawford's Bhé Hathi*," and afterwards as "*Graham's Bhé Hathi*," and indeed the Plaintiffs have not alleged in their pleadings that their yarn was ever known by the name "*Bhé Hathi*," though they do allege that their ticket was known as the "Elephant" or "Two Elephant Ticket." The Plaintiffs have no right to the name "*Bhé Hathi*" *simpliciter*.

(1) Law Rep. 1 Ch. 192, 196.
(2) Ibid. 197.
(3) 2 Ch. D. 434, 444.
(4) Law Rep. 2 P. C. 69.

[FRY, J:—Through all the variations of name there was one constant part, "*Bhé Hathi*," and it is not shewn that that name was ever applied to any yarn but the Plaintiffs'.]

The two tickets are sufficiently distinct, and the fair conclusion from the evidence is that purchasers would not be deceived. The mere contingency that some unknown buyers may be deceived is not enough. In *Ford* v. *Foster* (1) the use of the word "*Eureka*" had not merely grown up out of the use of a particular ticket, and moreover the general use of the word by the Defendants was not restrained; they were only restrained from putting the name on shirts manufactured by them, or on boxes or packages containing their shirts. The Court will interfere if the deception is inherent in the goods themselves; not if the deception arises only by reason of the incapacity of the person deceived to distinguish between the true and the false. The person deceived must be a person of reasonable intelligence. In *Seixo* v. *Provezende* (2) the mark itself tended to deceive. The same principle is recognised in *Singer Manufacturing Company* v. *Wilson* (3). The picture of two elephants is common property, just as the word "nourishing" was in *Raggett* v. *Findlater* (4); and the name "*Bhé Hathi*" is equally common property. In *Cope* v. *Evans* (5), there being no evidence of actual deception, and the Defendant's mark not being in the opinion of the Court likely to deceive, an injunction was refused. Here the tickets are so dissimilar that deception is improbable, and indeed there is evidence that the Defendants' yarn has become known in the market as "*Gunputty Hathi*." If a defendant takes only a part of a plaintiff's mark the plaintiff is bound to shew actual deception, or, at any rate, an intent to deceive: *Woollam* v. *Ratcliff* (6). It is admitted that one elephant is in common use, and the Plaintiffs cannot acquire an exclusive right by using two: *In re Barrows' Trade-Marks* (7). The Court must have regard not merely to the two tickets of the Plaintiffs and the Defendants, but to the whole of the tickets in use in the particular trade. And, though the fact that registration of the

(1) Law Rep. 7 Ch. 611.
(2) Ibid. 1 Ch. 192.
(3) 2 Ch. D. 434.
(4) Law Rep. 17 Eq. 29.
(5) Ibid. 18 Eq. 138.
(6) 1 H. & M. 259.
(7) 5 Ch. D. 353.

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Plaintiffs' ticket has been refused does not affect any rights which the Plaintiffs have acquired independently of the Act, that decision affords some indication of what their rights are. It is not necessary for us to prove that elephant tickets were used by other persons before the Plaintiffs: *In re Hyde & Co.'s Trade-Mark* (1). We have never used the name "*Bhé Hathi*," and in the Indian markets the "*Gunputty*" figure is certain to attract attention. The Plaintiffs could easily have obtained evidence of actual deception of the ultimate buyers in *India*, if any such had taken place. If they cannot prove that, at any rate they ought to prove a very strong probability of deception: *Cope* v. *Evans* (2). This they have not done.

One of the witnesses called on behalf of the Defendants was Mr. *Tomlinson*, the chief clerk to the Registrar of Trade-marks, who produced some of the books kept by the Registrar.

Aston, Q.C., proposed to use these books as evidence that a number of tickets of a triangular shape, of green and gold colours, and having elephants upon them, which were in use for cotton goods, had been refused registration, and that consequently such tickets were *publici juris*.

North, Q.C., objected to the admissibility of this evidence.

Aston, Q.C., relied upon *In re Orr Ewing's Trade-Marks* (3) as shewing that the evidence was admissible.

FRY, J., held that the books were not evidence of user as against the Plaintiffs. They were only evidence that other persons had made claims.

North, in reply:—

No doubt, we must shew a reasonable probability of deception; but it is not necessary to prove such a strong probability as Vice-Chancellor *Hall* appears to have thought necessary in *Cope* v. *Evans*. The *ratio decidendi* of that case is wrong. As to the similarity of the two tickets, the Plaintiffs' name is printed on their ticket in letters which the natives of *India* can read; the

(1) 7 Ch. D. 724. (2) Law Rep. 18 Eq. 138.
(3) 8 Ch. D. 794.

Defendants' name is printed on theirs in letters which the natives cannot read. This renders deception more, instead of less, probable: *Ford* v. *Foster* (1) is in point as to this.

[FRY, J.:—There the Court was satisfied that the ultimate purchaser did not care about the maker's name; he only cared about getting a shirt of a particular pattern.]

In *Kinahan* v. *Bolton* (2) the name of the plaintiff was always put prominently forward with the letters "*L. L.*," but his whisky had been always known in the market as "*L. L.*" simply, and the defendant was restrained from using those letters, though he had used his own name with them. The question is, whether the Defendants have taken a material and substantial part of the Plaintiffs' mark: *Ford* v. *Foster* (3); if they have, the *onus* is on them to relieve themselves from their *primâ facie* liability.

[FRY, J.:—Will purchasers take the Defendants' mark to be the Plaintiffs'? Here the question is, what will the natives of *India* think?]

The evidence shews a strong probability that the ultimate native buyers who live in the country will be deceived, though the native dealers in *Bombay*, who are men of intelligence, will not. There is a general similarity between our ticket and that of the Defendants', and they have taken the material and substantial part of ours, viz., the two elephants, which have given the name which our yarn bears in the *Bombay* market. In *Seixo* v. *Provezende* (4) there was no proof of actual deception. In *Edelsten* v. *Edelsten* (5) the plaintiff's mark was an anchor, and though the defendants had adopted as their mark a crown and an anchor, Lord *Westbury* held that they could not use the anchor, because it was from it that the market name of the plaintiff's wire had been derived. So here, the market name of our yarn, "*Bhé Hathi*," is derived from the two elephants on our ticket.

[FRY, J.:—The difficulty I feel is whether the Defendants' yarn is likely to be known as "*Bhé Hathi*."]

In *Singer Machine Manufacturers* v. *Wilson* (6) Lord *O'Hagan*

(1) Law Rep. 7 Ch. 611.
(2) 15 Ir. Ch. Rep. 75.
(3) Law Rep. 7 Ch. 623.
(4) Law Rep. 1 Ch. 192.
(5) 1 D. J. & S. 185.
(6) 3 App. Cas. 395.

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said that if a man uses a name which has been validly appropriated by another, he must use such precautions that the reasonable probability of error may be avoided. The *onus* is on the defendants to justify what they have done. In *Woollam* v. *Ratcliff* (1) the one important thing in the plaintiff's mark had not been taken by the defendant.

[FRY, J.:—If I grant you an injunction, can I extend it beyond the use of the ticket in the *Bombay* market? The object of the injunction is to prevent a repetition of the deception; if deception is proved in one market, can I restrain the use of the ticket all the world over?]

By the use of the two elephants the Defendants have represented their goods to be those of the Plaintiffs; it is no answer to say that elsewhere there may be a legitimate use of the ticket. In all trade-mark cases the user must be limited to some locality. The injunction ought to be in general terms. In *Harter* v. *Souvazoglu* (before Vice-Chancellor *Hall* on the 20th of January, 1875, and before the Court of Appeal on the 7th of May, 1875), the infringement complained of was in *Constantinople*, but the injunction was not limited. It would be very difficult, if not impossible, to trace the purchasers of the Defendants' yarn, and thus obtain actual proof of deception. But the *onus* is really on the Defendants, and they have given no satisfactory explanation of their adoption of the two elephants.

Aston, in reply, as to *Singer Machine Manufacturers* v. *Wilson* (2):—

The observations of Lord *O'Hagan* apply only to a case where the defendant has actually used a name which has been already appropriated by the plaintiff. Here the *onus* is on the Plaintiffs to shew that it is probable the Defendants' goods would become known by the name "*Bhé Hathi*," and not by the name "*Gunputty*."

FRY, J:—

In this case the Plaintiffs claim an injunction to restrain the Defendants from using a ticket which the Plaintiffs allege, and

(1) 1 H. & M. 259. (2) 3 App. Cas. 395.

which the Defendants deny, to be a trade-mark. [His Lordship stated the facts and continued:—]

Then I come to the comparison of the two tickets, and the first question I have to ask myself with regard to them is this, judging them as an Englishman, and knowing the habits of English people, would the one be taken for the other by dealers or purchasers of ordinary prudence? [His Lordship then discussed the two tickets, and continued:—]

I repeat the question, should I be deceived so as to take the one ticket for the other, even if the two were not before me together, supposing me to be a purchaser of ordinary caution and ordinary intelligence? I answer that I should not; and for this reason, that the two tickets certainly do not impress the eye as being the same throughout. There is a great similarity undoubtedly, but in the one there is a name which I can read, and in the other there is a name which I cannot read, and therefore there is a very strong difference between them. I can understand from whom the one ticket emanated, but I cannot tell from whom the other came. I can read the place of manufacture upon both, and I can see that the places are different. I know further that the Plaintiffs always used this green ticket coupled with a trade-mark which the Defendants have not imitated, and to which the Plaintiffs have challenged the attention of the reader by marking it as their trade-mark. That question, therefore, I should have to answer in the negative.

But then arises the second question. Have the Defendants taken a material and substantial part of the Plaintiffs' ticket? For this purpose it seems to me immaterial to consider whether the ticket is strictly entitled to be called a trade-mark or not, for reasons which will appear in the course of what I am about to say. Before I can answer the question as to materiality of the part taken, I must have regard to two things. In the first place I must look at the tickets and inquire whether a large part of that which impresses the eye has been taken, whether a significant characteristic of the ticket has been taken, and I must answer that it has. I find that the two elephants in the two top corners of the Plaintiffs' ticket are repeated in the two top corners of the Defendants' ticket. It is quite true that the elephants are

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in a different position, the Defendants' elephants have howdahs upon them, and the Plaintiffs' have not, and the trunks are turned in different directions, but still in each corner there is an elephant. That impresses the eye with a considerable amount of similarity.

I must next inquire what is the mode in which the Plaintiffs' goods have been accustomed to be sold, and what people have called them. It is in evidence that the Plaintiffs' goods have been sold in the *Bombay* market for a number of years under the name of "*Bhé Hathi*," which means two elephants. There is undoubtedly a considerable conflict of evidence upon that point, but it appears to me to result in this, that the name "*Bhé Hathi*" has been used, and for a very considerable number of years, as designating the Plaintiffs' goods in the *Bombay* market. Some twenty years ago a firm of *Crawfords* acted as the consignees in *Bombay* of the Plaintiffs' goods, and it is in evidence that the Plaintiffs' goods were then known as "*Crawfords' Bhé Hathi*." *Crawfords* were succeeded by *Graham & Co.*, who down to a few years ago acted as the consignees of the Plaintiffs' goods, and the common name of the goods was then "*Graham's Bhé Hathi*."

[His Lordship referred to the evidence on this point, and added:—] I come to the conclusion, therefore, that that was the name by which the Plaintiffs' goods were sold in the *Bombay* market.

There are two suggestions to which I must advert before passing on. In the first place it is said that there is a great deal of evidence which shews that other tickets besides the Plaintiffs' were in use bearing two elephants upon them, and that those, therefore, would be "*Bhé Hathi*" tickets, and the goods to which they were affixed would be known as "*Bhé Hathi*" goods.

But the evidence does not satisfy me that any ticket bearing two elephants on it, except that of the Plaintiffs, had become generally known in the *Bombay* market.

Another argument which has been addressed to me is this: It has been proved that the name "*Bhé Hathi*" is not the sole name which has been used for the Plaintiffs' goods in the *Bombay* market. Their goods are known as "*Hathi*" yarn, "*Bhé Hathi*," "*Asul Graham*," and various other names; and it is argued that where goods of one manufacturer bear a number of names, another

manufacturer may use a ticket by which he may appropriate to himself one of those names, though he could not do so if the goods had borne that one name only. In my opinion that argument ought not to prevail for a moment. If goods are sold in the market by a particular maker as *A.* or *B.*, in my judgment no rival manufacturer has the right to appropriate to himself either of the names *A.* or *B.* Having, then, arrived at the conclusion that the goods of the Plaintiffs which bore the mark in question were known as "Two Elephant" or "*Bhé Hathi*" goods, it follows, in my judgment, that the two elephants were a material and substantial part of the Plaintiffs' ticket, because they communicated the name to the goods. In *Edelsten* v. *Edelsten* (1) Lord *Westbury* observed (2) that the essential part of the plaintiffs' trade-mark was the anchor, from which the market name of his wire had been derived.

What, then, is the result of this taking of a substantial part of the Plaintiffs' ticket? It appears to me that it throws upon the Defendants the burden of proving that their ticket did not deceive purchasers into the belief that the Defendants' goods were the Plaintiffs'. In *Ford* v. *Foster* (3) Lord Justice *James* made this observation (4): "The plaintiff makes this *primâ facie* case—that he has a plain trade-mark, a material and substantial part of which has been taken by the defendants. Then the *onus* is, under those circumstances, cast upon the defendants to relieve themselves from that *primâ facie* liability;" and it appears to me to be in accordance with this view of the Lord Justice that Lord *O'Hagan*, in *Singer Machine Manufacturers* v. *Wilson* (5), said (6): "If one man will use a name the use of which has been validly appropriated by another, he ought to use it under such circumstances and with such sufficient precautions that the reasonable probability of error should be avoided, notwithstanding the want of care and caution which is so commonly exhibited in the course of human affairs. I do not say that the mere possibility of deception should suffice to make the appropriation improper, but the chance of misleading should be jealously estimated with a view

(1) 1 D. J. & S. 185.
(2) Ibid. 202.
(3) Law Rep. 7 Ch. 611.
(4) Law Rep. 7 Ch. 623.
(5) 3 App. Cas. 376.
(6) Ibid. 395.

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to this consideration, even though ordinary attention might have been enough to protect from mistake." It appears to me, therefore, that I ought to hold that if one man will appropriate to himself a material and substantial part of the ticket which another man has used for the purpose of indicating his goods, he ought so to appropriate it, and with such precautions, as that the reasonable probability of error should be avoided. I proceed, therefore, to inquire whether the Defendants have appropriated that material part of the Plaintiffs' ticket which I hold that they have appropriated, with due precautions to prevent mistake.

In considering and answering that question, it strikes one at first that they have thought fit to print the name of their firm upon their ticket in a language which can be read, undoubtedly, by the original purchasers of their goods, but which cannot be read by the ultimate purchasers in the Indian markets, and therefore the protection which would be given by a name capable of being read wherever the goods go is not afforded by their ticket. According to the evidence before me, when the goods reach *Bombay* they pass generally into the hands of merchants dealing in a wholesale way; they are then distributed through the intervention of a series of middle-men, who it appears form a numerous class, employed in the distribution of the goods over the country. In my judgment, the first class of purchasers would probably not be deceived. But, upon the whole of the evidence before me, I think that there is a strong probability that the ultimate purchasers, the weavers who buy the goods in the country villages, and probably also the retail dealers who sell to them, would be deceived by the Defendants' ticket. One of the witnesses, who is a dealer in English yarn in *Bombay*, said that, in his opinion, the native buyers would be deceived, because they "would ask for '*Bhé Hathi*,' and there" (that is, as I understand him, on the Defendants' ticket) "are '*Bhé Hathi*.'"

There is a great deal of evidence to which I attach weight, which shews that these goods are sold largely by name, and that, although no doubt the first buyers look at the tickets, and the brokers in *Bombay* probably look at the tickets, yet the ultimate purchasers and the purchasers from the dealers in *Bombay* probably do not look at the tickets at all, and at any rate are liable

to be deceived by the name by which the goods are sold. In coming to that conclusion I do not forget that there is a conflict of evidence upon the point, that there are those who say that the native buyers will not be deceived, and that the Defendants' ticket would be known as the "*Gunputty*" ticket; that there are those who say that the goods exported by the Defendants have already received the name of "*Gunputty.*" But it appears to me that the burden resting, as I hold that it does, on the Defendants to shew that they have used all due precautions to prevent deception and error, they have failed to discharge that burden.

There is a considerable amount of evidence that people have called the Defendants' goods "*Gunputty,*" but the greater portion of that evidence relates to conversations which took place long after this action had begun, a good deal of it in the immediate expectation of a pending commission to take evidence at *Bombay*, and, I am bound to say, a good deal of it appears to me to be conversation between persons likely to be witnesses before that commission. I do not think there is sufficient evidence to prove that any name had got attached to the Defendants' ticket which would safely distinguish it from the "*Bhé Hathi*" ticket of the Plaintiffs. In coming to this conclusion I have not failed to bear in mind that I am ignorant of the customs of the natives of *India*; I do not know their movements, their language, or their habits, and I have great difficulty in concluding from the mere *evidentia rei* that deception would take place. But I found my judgment on this, that the burden of shewing that there will not be deception rests upon the defendant in a case in which he has taken a substantial part of the plaintiff's ticket, especially when he has taken that part of it which has given the name, or a part of the name, which the goods bear in the market.

On this ground I think the Plaintiffs were justified in coming to this Court. The Plaintiffs have also endeavoured to bring home to the Defendants a personal design to deceive. I do not feel able to place implicit reliance on the history of the Defendants' ticket as detailed to me by their evidence; but at the same time, if the case had rested on the personal fraud of the Defendants in concocting that ticket, I should not have held that the Plaintiffs had made out their case.

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I must, for the reasons I have stated, grant an injunction to restrain the Defendants, their servants, &c., from affixing or causing to be affixed to any Turkey red yarn not dyed by the Plaintiffs the ticket marked B, and from using two elephants on any ticket used on Turkey red yarn without clearly distinguishing such ticket from the Plaintiffs' ticket marked A, and from employing any mark or words which may be calculated to cause any Turkey red yarn not dyed by the Plaintiffs to be known in *Bombay* as "*Bhé Hathi*" yarn, or to represent or induce the belief that any of the said yarn was dyed by the Plaintiffs. Of course this judgment must be with costs against the Defendants.

The injunction granted was as follows:—"To restrain the Defendants *Robert Johnston & Co.*, their servants, workmen, and agents, from affixing or causing to be affixed to any Turkey red yarn not dyed by the Plaintiffs *Archibald Orr Ewing & Co.* the ticket marked B, and from using two elephants on any tickets used on Turkey red yarn, without clearly distinguishing such tickets from the Plaintiffs' ticket marked A, and from employing any mark or words which would be calculated to cause any Turkey red yarn not dyed by the Plaintiffs to be known in *Bombay* as "*Bhé Hathi*," or to represent or induce the belief that any of the said yarn was dyed by the Plaintiffs," with an order for an account of profits and costs.

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The Defendants appealed from this decision. The appeal came on to be heard on the 16th of January, 1880.

In the course of the argument the Defendants' counsel referred to the printed shorthand notes of the evidence before Mr. Justice *Fry*. These notes had been taken by the Plaintiffs, who had furnished a copy of them to the Defendants, but they had been printed by the Defendants at their own expense. The Plaintiffs had obtained a copy of the Judge's notes of the evidence and had had them printed, and they now objected to the evidence being read from the printed shorthand notes, of which they said they had received no copy.

The Court directed the Defendants to give the Plaintiffs copies

of the printed shorthand notes on their paying a reasonable price for them: and ordered the evidence to be read from the Judge's notes, which might be supplemented, if required, by reference to the shorthand notes.

Aston, Q.C., and *J. Cutler*, for the Appellants, followed the same line of argument as before Mr. Justice *Fry*. They referred to *In re Barrows' Trade-Marks* (1); *Singer Machine Manufacturers* v. *Wilson* (2); *Cope* v. *Evans* (3); *Woolham* v. *Ratcliff* (4); *Carver* v. *Bowker* (5); *Webster* v. *Power* (6).

North, Q.C., and *H. A. Giffard*, for the Plaintiffs, were not called on.

JAMES, L.J.:—

Notwithstanding the length of time which this case has taken, a length of time not disproportionate to the weakness of the Appellants' case, I am of opinion that the material and relevant facts are very few, and that the inference to be drawn from those facts is very plain.

The Plaintiffs had for many years, in the *Bombay* and other markets subsidiary to the *Bombay* market, a very large trade in Turkey red yarn, and for the purposes of that trade they used a ticket which has been proved, perhaps more strongly by the evidence for the Defendants than by the evidence for the Plaintiffs, to be a singularly valuable and a singularly effective trade-mark. It appears that the mere ticket itself immediately communicated to the minds of all persons conversant with that particular kind of business that the goods marked by it were the goods of the Plaintiffs, that is to say, were the goods of the house in *Bombay* through which the Plaintiffs sold them. Whether they were known as "*Graham's Asul*," or "*Bhé Hathi*," or *Graham's Bhé Hathi*," all those are names tending to the same conclusion that the ticket indicated to all the persons to whom it was intended to be shewn that the goods were the Plaintiffs' goods; and it appears

(1) 5 Ch. D. 353.
(2) 3 App. Cas. 376.
(3) Law Rep. 18 Eq. 138.
(4) 1 H. & M. 259.
(5) Sebastion on Trade-Marks, p. 350.
(6) Law Rep. 2 P. C. 69.

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that, apparently not from that ticket only, but from the reputation which that ticket had acquired as a trustworthy guarantee for the goodness of the goods covered by it, the Plaintiffs' goods were sold at a higher rate, and therefore were sold more commonly and readily than any other goods in the *Bombay* market. I say it was probably due to the ticket and to the character of that ticket, because it appears that the very same goods in competition with the same rivals did not maintain the same character in *Calcutta*, where probably the ticket had not acquired the same reputation.

We start, therefore, with this, that the Plaintiffs had a very valuable trade-mark consisting of the ticket, or of which the ticket was the symbol. The ticket consisted of a great deal of green colour, a great deal of gold about it, and two elephants with a banner joining them, or something in the nature of a banner passing from one elephant round the bottom of the ticket and up to the other elephant, with a crown in the centre. That was the Plaintiffs' mark.

The Defendants are persons who have been for some years engaged in exporting goods to a considerable extent to the same markets, but not the Turkey red yarn, which the Plaintiffs' trade principally consisted of. For the purposes of this trade they had established their own distinctive trade-mark, a very conspicuous, a very pretty, and a very taking trade-mark, according to their own evidence. It was a trade-mark that contained the effigy of a Hindoo idol called "*Gunputty*," which formed a large part of the ticket. It was not exactly of the same shape as the Plaintiffs', which was a triangle, but oblong, very much gilt and very green in the other parts. It was quite sufficient for all honest purposes to distinguish the Defendants' goods from anybody else's goods.

In that state of things it appears that an agent of the Defendants went to a person in *Aden*, who was in the habit of buying the Plaintiffs' goods, and told him that the Defendants, *Johnston & Co.*, could sell him the same kind of goods which he had been buying from the Plaintiffs' consignee, *Dabadhoy*, at a cheaper price. That same gentleman writes to them, and refers to the ticket of *Dabadhoy;* he does not in terms say, Send me a ticket of the same kind, or colourably differing from the Plaintiffs, but he refers to *Dabadhoy's* ticket, and says, Send me a ticket upon

them. Upon that, with the advice or assistance of an engraver and other persons, the Defendants, without any conceivable motive which has been suggested or can be suggested for their conduct, make a new ticket. They do not use the "*Gunputty*" ticket, which was their trade-mark by which their goods were generally known, for the goods that were going to be sent to a man that had bought and sold the Plaintiffs' goods, and who was about to buy their goods and sell them of course to the same customers who had been buying from him the Plaintiffs' goods; they devise, make, and have printed a new trade-mark, in which the oblong of the Defendants' old "*Gunputty*" ticket is converted into a triangle exactly the same, except a little difference in size as the Plaintiffs' mark, with the green exactly the same, the gilding the same, and with two elephants joined by a banner which is substantially the same.

Now, what could have been the only motive which can be suggested to a man of the world by a man of the world of the Defendants in doing that, but to do something which was likely to be mistaken for the Plaintiffs' goods, which would be accepted by the customers of the man who had been in the habit of selling them as being a continuation of the same goods which he had been in the habit of supplying to them? It is not necessary for this case to decide that a man actually intended to tell a lie, or that a lie has been told. It is sufficient, in the language of Lord *Kingsdown*, that a man should wilfully use a part of the trade-mark of his neighbour, that part so used being by the user of it calculated to enable his goods to be passed off for the goods of his neighbour. I am of opinion, independently of the mass of evidence which has been given in support of that probability, that it was probable, and probable almost to a certainty, that the new ticket of the Defendants would tend to enable anybody so minded to represent those goods as being goods of the same character, proceeding from the same manufacturers, as the goods which had been formerly accepted with confidence under the mark which was a guarantee of the Plaintiffs' goods. It was calculated to do so. Beyond that, supposing that by some accident a man had inadvertently used a ticket which was so calculated to deceive the ultimate purchaser, and therefore so calculated to injure the

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Plaintiffs in their legitimate right of property in a trade-mark, the moment the attention of the Defendants or any persons in their position was called to the fact of the similarity of the two marks and to the complaint of the persons who owned the first mark that it was likely to injure them, it was his duty to immediately discontinue the use of the trade-mark complained of; and, however honest or inadvertent the original mistake may have been, the continuation of the use of it after that was pointed out is itself sufficient evidence of a fraudulent intention. The fraud would then consist in continuing to do it even if there had been an original inadvertence in the use of it. But I am bound to say in this case, that I am not, on the evidence, satisfied that there was any innocent inadvertence or mistake. I am not satisfied that there was not from the first an original intention to use an imitation of the Plaintiffs' mark with the intent that that imitation should enable the Defendants' goods to be passed off as the Plaintiffs' goods. I am of opinion that Mr. Justice *Fry's* judgment must be affirmed with costs.

BAGGALLAY, L.J.:—

I am of the same opinion. The law applicable to cases like the present is well known; its general principles have been enunciated by the Lord Justice in the course of the judgment which he has just delivered, and I need not refer to them more particularly. The question in all these cases is as to the application of principles which are well known. The question, in my opinion, which we have to consider in this case is simply this, Have the Defendants used upon the Turkey red yarn exported by them a mark, the reasonable and probable result or consequence of the use of which would be to lead persons purchasing such yarn to believe that they were purchasing yarn dyed by the Plaintiffs?

Now, in judging of the reasonable and probable result or consequence of the Defendants' acts or conduct, it is important not only to bear in mind the acts or conduct of the Defendants, or of those for whose acts and conduct they are responsible, but also the circumstances existing at the time when such acts or conduct were done or occurred.

And first what were the existing circumstances of this case so far as they affected the Plaintiffs? The Plaintiffs, in a succession of firms, had carried on business from the year 1845; for the first five years as dyers of Turkey red cloth, as distinguished from yarn, but in 1850 they very much enlarged their business and went into the manufacture and dying of Turkey red yarn, and the selling or exporting it to foreign countries. In the course of that business, and from 1850 downwards, they had used that which is known in the course of this action as the trade-mark A, and they had used it throughout the whole of that period. The principal Plaintiff states in his evidence that that ticket was designed from his instructions by his then principal draughtsman, and was engraved by *Maclure & Macdonald* in 1850. It was a perfectly well-known trade-mark in the Eastern market, at any rate in *Bombay* and *Aden*, with which we have at present to deal.

Now, on the other hand, what was the state of circumstances as affecting the Defendants? The Defendant *Johnston* had originally been employed in *India*, but in a very different capacity, in some way in connection with a railway. He afterwards carried on business in shipping miscellaneous goods to *India;* hardware, paper, arms, or anything else which might be ordered of him; but in or about the year 1870 he became associated with a person of the name of *Moolla*, a native of *India*, and a species of partnership appears to have existed between them. He tells us that down to the year 1875, when he shipped his first cargo of Turkey red yarn to *Aden*, he had never done anything in Turkey red yarn. He had shipped *Manchester* grey shirting and Turkey red cloth, as distinguished from Turkey red yarn, and with reference to the business he had so carried on he had used a distinctive trade-mark bearing the figure of the Indian goddess "*Gunputty*," a design pretty and elegant in itself. It is important to bear in mind that he had used this trade-mark or design for the purpose of his trade down to that time, but he then thought it necessary or desirable to adopt a different form of trade-mark, as he was embarking in a different branch of trade. I think nothing whatever of his adopting a triangular form of ticket, whereas he had previously used a rectangular one; because from the mode in which this Turkey red yarn is packed a triangular ticket fits very conveniently over the

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fold of the packet as it is done up in bundles. I think nothing of his using the green colour, or the gold embossed on the green, they had previously been used not only by the Plaintiffs but by a variety of other persons; but the Plaintiffs in their design had introduced upon the triangular green ticket a label bearing a certain inscription, a label in the form of a banner or shawl, supported at the two corners by elephants, and their ticket had acquired in *India* the name of the "*Bhé Hathi*," or two elephant ticket. Now it was quite open to the Defendants' firm when they first commenced this extended business to have adopted a triangular form with the green and gold, and with any design that might suit their fancy, provided they did not interfere with a mark the right to which had been acquired by any other person. It is said the Indians are fond of animals. It was open to the Defendants to select any other animal, or any other combination of animals, but they start with taking two elephants as the supporters of their banner, the same supporters which the Plaintiffs had already used, but with a slight difference, because in one case the elephant's trunk is turned towards the centre, and in the other case the elephant's tail is turned towards the centre; and in one case the elephant had a howdah on his back, and in the other he had not, but in each case the banner was suspended from the elephants. When a rival in trade adopts a design somewhat resembling that of a person engaged in the same trade who is already entitled to a particular design, he enters into the contest very heavily handicapped, if I may use the expression—not perhaps altogether a judicial one. The imitation runs very closely to that which another person is entitled to; and the extra weight he has to bear in respect of that is still more increased if it appears that he intended to go as near to the wind as he possibly could go.

Now I have paid attention to the correspondence in this case, and particularly to that which covered the first order sent to the Defendants' firm from *Aden* for this article, and I have given full weight to the way in which Mr. *Cutler* dealt with it, but I am bound to say that the suspicions attaching to the correspondence from my first reading it were not removed by Mr. *Cutler's* argument. There is upon the face of that order so sent to *England* a clear suggestion of a ticket being designed, with a view to its

being placed on the twist exported under the order, of the same size and of the same colour as the ticket which was the Plaintiffs' trade-mark, and from the instructions so sent orders were given to the engravers in *Glasgow* to prepare the design which was adopted by the Defendants. There is of course a possibility of the whole transaction having been honest, but the circumstances under which this design was prepared ought to have rendered the parties doubly careful with regard to anything they did in respect of it; and I am bound to say that, in my opinion, the case is one of the very strongest suspicion as regards an intention to imitate and to copy the Plaintiffs' trade-mark. But it does not appear to me to be necessary for the Plaintiffs to establish that such an intention existed. It might have had an influence as regards the costs of the action, if the Defendants had been misled by the Plaintiffs, or if they had acted entirely through inadvertence; but even if they had acted through ignorance or inadvertence, they could not be allowed to continue to use a trade-mark of a character which would be calculated to lead to the deceit which I have already suggested.

It does not appear to be necessary to enter into any further comment upon the evidence of this case. I am satisfied on that evidence that the question which I suggested at the outset as the one which we were called upon to answer in this case must be answered in the affirmative. I am satisfied that the mark which the Defendants have used is one calculated to deceive the purchasers of the articles to which it was affixed, or of the articles contained in the bundles to which it was affixed, and that it must have that effect. That being the case, it seems to me impossible to dissent from the view taken by Mr. Justice *Fry*, and I think his judgment must be affirmed.

COTTON, L.J.:—

The question which we have to consider on the present appeal is whether or no the use by the Defendants of what has been called the "B" ticket is calculated to cause the Defendants' goods to be mistaken for those of the Plaintiffs, and whether or no the Defendants are to be considered as using or persisting in the use of that ticket with the intention of, by themselves or others who buy from

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them, causing their goods to be mistaken for the Plaintiffs' goods. I only refer to that for the purpose of dealing with the argument, which was somewhat pressed upon us, that that was not the case raised by the pleadings. In my opinion it is clearly and distinctly raised in the statement of claim, and there are also various matters mentioned in it which lead up to it, and shew how and why the mistake might arise.

Now how is that to be decided? What we know is this—and I shall refer to the facts very shortly—that the Plaintiffs had been for many years using on Turkey red yarns imported into *India* by or for them a particular ticket. That ticket was in shape triangular and coloured green, but it had upon it, amongst other things, two elephants, placed in a particular way and connected by what is called a banner, but which is called sometimes a curtain. It is in evidence, and is undisputed, that for many years the Plaintiffs' goods were sold by various dealers in *India* by *Graham*, and afterwards by others, and had been known either as "*Graham's Bhé Hathi*" or "*Bhé Hathi*" yarns. I refer to this as shewing that in the minds of those who were purchasers of these goods the particular parts of the ticket with two elephants so placed, and with the surrounding circumstances, are a distinguishing feature of those labels. For although there was evidence given on the part of the Defendants, and it is admitted that there were numerous other tickets with elephants upon them, in very few instances do we find that any of the goods sold with these tickets have acquired the name of "*Elephant*" tickets. There was no evidence of any use of two elephants at all similar to the use of the two elephants in the Plaintiffs' tickets. This being so, in my opinion it is undoubted that this ticket must be considered as a a trade-mark to which the Plaintiffs had a right, that is to say, if it had been put upon the goods of any other person no one could have for a moment doubted that it was intended and calculated to pass off the goods of those other persons as the goods which had been sold under the Plaintiffs' ticket "A."

What do the Defendants do? They, having traded to various parts of the East in other goods than Turkey red yarns, determined to undertake a trade in that commodity, first of all, to *Aden*. They had an existing ticket with the "*Gunputty*" figure upon it, but

when they determined to embark in the sale of this Turkey red yarn they determined to have a new ticket. They might take a triangular ticket, and they might take a ticket with green and gold upon it; because that was so frequent that no observation could have been made upon it. But then comes this question: why did they desire any addition whatever to a triangular ticket with the goddess "*Gunputty*" upon it? We have had numerous bundles of tickets handed up to us, and I find in these bundles that there is a variety of forms and ornamentation; but it is not unfrequent to find some single emblem, such as the "*Gunputty*," as the sole figure or emblem on the ticket. But if they determined to make any addition, why did they make the addition which in fact they have made—namely, two elephants connected with a piece of drapery suspended from them? The best which can be said for the Defendants in that respect is that no explanation can be given of it.

Then we come to the question, Is the use of this ticket on the goods exported by the Defendants calculated to lead to their goods being mistaken for those of the Plaintiffs? or, I may add, to lead to their goods being sold under the name under which the Plaintiffs' goods had frequently been sold? Because that is really the same thing. And the importance of that name, as I have already said, being attributed to goods sold with the Plaintiffs' "A" ticket, is, in my mind, simply to shew how important as a distinctive part of this ticket the elephants of the Plaintiffs, as so placed and so connected, were to the minds of the persons who dealt in them, both in the markets of *Bombay* and *Aden*.

Before considering the question whether it is calculated to mislead, I must refer to the argument, which was much pressed upon us, that the Plaintiffs claim to have distinctive tickets in different classes of goods, in which two elephants are in the same place and of the same size and colour, but with minute differences—(I call them minute differences, because that was the argument of the Defendants)—such as the non-filling up of the banner with gold, simply leaving it in lines; and if those, as the Plaintiffs' witnesses say, and as they would have to contend when they registered the marks, make a distinction, can it possibly be said that the Defendants' ticket is not a distinctive ticket, and one, therefore,

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which the Defendants had a right to use? All that we have to deal with is the question whether those tickets were not calculated to cause the Defendants' export to be mistaken for the Plaintiffs'. That is the question, and of course that must be dealt with in relation to the only market for which this ticket is used by the Respondents, and to which they intend to export, in competition with the Plaintiffs, goods when ordered from them.

As regards the distinctiveness of the Plaintiffs' marks, Nos. 1775 and 1776, which I take as examples (1). These may be distinctive as between the different classes of the Plaintiffs' own manufacture, but no one could doubt that if any trader other than the Plaintiffs had taken label 1776, which is for light yarn, as distinguished from 1775, which is for heavy yarn, that would have been an infringement of the Plaintiffs' trade-mark, and could only have been used for the purpose of passing off the goods of the person who took that trade-mark as those of the Plaintiffs. The question which we have to deal with here is not whether, as between two classes of a manufacturer's own goods, certain marks are or not distinctive, but whether such differences as have been mentioned can displace the argument that the use of a particular label is calculated to mislead.

I ought also to deal with the argument that the figure "*Gunputty*" in this ticket is not only evidence of *bona fides*, which I will deal with presently, but that on the evidence it must be taken to be the distinguishing mark of the Defendants' label. Now I cannot place very much reliance on the evidence given on behalf of the Defendants. If the facts were that this had been used for many years in *India*, and the evidence was that it had acquired a distinct name, by means of which it was always recognised in the market as the "*Gunputty*" ticket, and was so well known by that name that ordinary dealers and ordinary purchasers were alive to the distinction, that would be a very different case from what we have to deal with. What we have to deal with on the evidence is this, that for a short period before the hearing of this case—I say that advisedly—persons have

(1) In No. 1775 (which was ticket "A") there was a crown over the banner, and the banner was filled in with gold. In No. 1776 there was a crest of a lion rampant over the banner, and the banner was left green.

called that the "*Gunputty*" ticket, and the agent to whom goods were exported with that ticket endeavoured to sell them, or spoke of them to brokers, as goods with the "*Gunputty*" ticket, and not as goods with the "*Elephant*" ticket. Naturally they would do so if they were trying to induce brokers to effect sales of the Defendants' export in lieu of the Plaintiffs' export, and naturally it would be spoken of as the "*Gunputty*" ticket when the persons were considering what difference could be suggested between the two tickets, having regard to these proceedings, or after these proceedings were instituted. There is an entire absence of evidence which would justify us in holding that the "*Gunputty*" figure was well known and recognised in the market as characteristic of the Defendants' goods with the "B" ticket; so that, in my opinion, we cannot consider that, if otherwise the ticket is calculated to deceive, there is anything in that which prevents it from deceiving.

I entirely agree with the rest of the Court that the use of the ticket is calculated to deceive, and will probably deceive, because one sees, without entering at length into the evidence, how that can be done. It is not enough to say that when the two tickets are together and a question is raised about them, persons would not be deceived. What we have to deal with is this: A great variety of purchasers of different kinds, many of whom regard generally, but not minutely, the ticket on which they rely, are likely to be misled; and even in the case of purchasers of single hanks, it affords a ready means to the seller to induce them to buy the Defendants' yarn as "*Bhé Hathi*" yarn, instead of the Plaintiffs' yarn; because if any question were raised, the seller can easily produce the package and shew the end of it with the two elephants upon it. I am satisfied that very few purchasers who asked for "*Two Elephants*" yarn would not be misled when the parcel was produced to them having this ticket with the two elephants at the end of it. We must, in dealing with questions of this kind, not look for minute differences, or even that which appears, when one hears the case argued thoroughly with a mind directed to the particular difference, in some respects a substantial difference, but we must see what would be the effect upon the mind of the general class of buyers. I say that, for this reason:

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We have here no evidence of actual deception—that, I think, having regard to the time, was practically not very probable to be obtained—but it is not necessary, and when we have witnesses on the one side saying the tickets would be mistaken one for the other, and on the other side saying they would not be mistaken, we must use our own sense, and, looking at the tickets and the circumstances of the market, we must say whether in our opinion this use of a particular ticket by the Defendants is or not calculated to mislead, to enable the sellers to pass off the Defendants' export as the Plaintiffs', to enable them to pass it off when "*Bhé Hathi*" yarn is asked for, or when the Plaintiffs' yarn is asked for.

Then we must deal with this point: The Defendants have not taken the actual trade-mark of the Plaintiffs, but only used a ticket which is calculated to mislead. Therefore, to sustain the injunction we must treat the case as one of fraud, that is, as a case turning on Defendants' intent to use that which is calculated to deceive? In my opinion it would be sufficient to say that for some months before the suit was instituted remonstrances were made by the Plaintiffs, and that, notwithstanding, the Defendants did not yield. The Defendants say that the claim made on behalf of the Plaintiffs was put with harshness, and that the harshness and peremptoriness of the demand justified the course which was taken by the Defendants in not yielding. But as regards that apparent harshness and peremptoriness, I must say, when one looks at the facts which were proved in this case, that was not entirely uncalled for. On the other hand, the Defendants' answer and suggestion that the matter should be left to counsel with the two tickets, was really nugatory, because counsel could not, on those materials, form a just and correct opinion on the question which we have to decide now. More than that, some months after, when the action was brought, they do not say, We are ready to abandon this ticket, it is immaterial to us, but they go on and persist in claiming to use it with the knowledge of the circumstances, which rendered it probable that the use of this ticket would be calculated to mislead and to pass off, or to enable their goods to be passed off, as those of the Plaintiffs.

But I think we are also bound to consider in this case whether, independently of what I have adverted to, we can or not absolve

the Defendants from an intention, in adopting this ticket, to use and adopt a ticket calculated to mislead. In my opinion a very strong point against the Defendants is this: they had a ticket, the "*Gunputty*" ticket: they had been selling and exporting their goods to the East with that ticket; if they really desired to do that which was fair and just, and simply to get a ticket which would distinguish and become the trade-mark of their own Turkey red yarn, why did they not continue the use of that ticket, the goods exported under which I suppose they would say had acquired a name in the market? Why did they want to add anything to that, and why did they adopt this particular addition to it? It is true they say they wish to make an attractive ticket, that what they were required to do by their correspondents was to make it bright and showy. But this might have been done without these additions, and they might have left their "*Gunputty*" as the only figure upon the tickets. In my opinion they stand in a very different position, in the preparation of this ticket, from a man who is starting for the first time in a trade to the East, and has entirely *de novo* to make for himself a ticket. Then, by accident, he may in the multiplicity of tickets do something which may be complained of by others; but here, where the addition to the ticket is shewn to be such as is calculated to deceive, then a burden is thrown upon them of satisfactorily explaining how and why they made that particular addition. That, I think, is what Mr. Justice *Fry* meant—not that in all cases where fraud is charged, or in a case of this sort, the burden of proof is not on the Plaintiff to make out his case, but that where the Defendants do use, under suspicious circumstances, a ticket which of itself is calculated to deceive, then the burden of proof is thrown upon them to displace that *primâ facie* evidence against them, and to shew that in fact they were innocent in doing that which of itself is not innocent, because it is calculated to deceive. Therefore, if we are called upon to give a judgment upon it, although, in my opinion, it is not necessary, I could not arrive at the conclusion that this particular form of ticket was arrived at *bonâ fide* by or on behalf of the Defendants, or without any intention of deception, but I should have said that it was done with the intention of getting for themselves by the ticket the credit which the Plaintiffs had acquired in the market.

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The conclusion at which I have arrived is this, that the two elephants, as placed with the accompanying drapery on the Plaintiffs' ticket, are an essential part of the ticket from which the name of the Plaintiffs' goods in the market has been derived. I also arrive at the conclusion that the Defendants, without satisfactory explanation as to how and why they adopted the ticket "B," are claiming to use a ticket with two elephants so placed as to have a resemblance to that of the Plaintiffs, that the use of that ticket is calculated to cause the Defendants' goods to be mistaken for the Plaintiffs', and to be sold under the name by which the Plaintiffs' are sold and known, and that the Defendants either originally adopted that ticket with knowledge of the facts from which the intention to mislead must be imputed to them, or at all events, if that is not so, that they persisted in the desire to continue to use that ticket when they did know the facts from which it was probable that the ticket, if used, would deceive. Therefore, in my opinion, the judgment of Mr. Justice *Fry* is right, and must be affirmed.

I have only one word to add as to the generality of the injunction. If it had been suggested that the Defendants were trading in other parts of the world, in which they desired to use their trade-mark, I should have thought that the injunction ought not to have been generally against the use of this label on Turkey red yarn, but to have been restricted to the use of it in the export of goods to the East. But as a matter of fact the whole question has arisen as regards the export of goods to the East, to *Aden* and to *India*, and it is not suggested by the Defendants that they desire to use this label for any trade in any other part of the world. Under these circumstances, in my opinion, we need not disturb the injunction in the form in which it stands, although if there had been a reasonable suggestion that this was used or could be used reasonably in any other part of the world we might have done so.

JAMES, L.J. :—

The appeal will be dismissed with costs. I desire to add one word as to the harshness and peremptoriness of the Plaintiffs' demand which was complained of. In considering that, we must always bear in mind that the very life of a trade-mark depends upon the promptitude with which it is vindicated.

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North asked for the costs of printing the Judge's notes of the evidence.

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JAMES, L.J.:—Yes. With respect to the cost of the copies of the printed shorthand notes furnished by the Defendants to the Plaintiffs, they will have to be returned to the Plaintiffs as part of the costs of the appeal.

Solicitors for Plaintiffs: *Phelps, Sidgwick, & Biddle.*
Solicitor for Defendants: *A. Hindson Miller.*

Ex parte BUTCHER. *In re* MELLOR.

C. A. 1880 Jan. 22.

Bankruptcy—Partnership—Joint and Separate Estate—Alteration of Estate in Assets—Death of Partner—Authority to Trustees to carry on Business—Business carried on by some only of Trustees—Bankruptcy of New Firm—Right of Old Creditors to Assets of Old Firm remaining in Specie—Order and Disposition.

A father and son carried on business in partnership, under articles which provided that the machinery employed in the business should not form part of the capital, but should belong to the father. The father died, having by his will appointed his wife, his son, and his son-in-law executors and trustees. He authorized his trustees to continue his business, either alone or in conjunction with any person or persons, and to employ the capital employed in it in carrying it on, and also to employ in it any money, part of his general estate. After his death the widow and the son continued to carry on the business until they became bankrupt. The son-in-law took no part in the business, though he knew that it was being continued:—

Held, that, as the carrying on of the business by two only of the trustees was not authorized by the will, the machinery was not converted into assets of the new firm, and that consequently the unpaid creditors of the old firm were entitled to such of the machinery as remained in specie at the date of the bankruptcy of the new firm:

Held, also, that the creditors of the new firm were not entitled to the machinery on the ground that it had remained in the order and disposition of the new firm with the consent of the creditors of the old firm.

Decision of *Bacon*, C.J. affirmed.

THIS was an appeal from a decision of *Bacon*, C.J., which is reported (1). It is stated in that report (2) "the bank closed

(1) 12 Ch. D. 917, where the facts are fully stated. (2) 12 Ch. D. 920.

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their account with the former firm of *J. H. Mellor & Son*, and opened an account with the new firm, *in which they debited the new firm with the former balance.*" The statement contained in the words above placed in italics is erroneous, as is also the corresponding statement in the head-note (1). The bank in fact closed the account with the old firm, and opened a new account with the new firm, but they did not debit the new firm with the balance of the old account.

The trustee in the liquidation appealed.

Ambrose, Q.C., and *Finlay Knight*, for the Appellant:—

The question is whether the case is governed by *Ex parte Morley* (2) or by *In re Simpson* (3). We say it is governed by *In re Simpson.*

[JAMES, L.J.:—How did the property in question cease to be assets of the testator?]

He authorized his trustees to carry on the business and to employ his capital in it.

[JAMES, L.J.:—He authorized his trustees to carry it on; he did not authorize two of them to do so.]

Buckley, the third executor and trustee, knew of the business being carried on, and must be taken to have assented to it. There was an arrangement by all the executors, in pursuance of the authority given by the will, that the business should be carried on by the widow and the son on the terms of the old partnership, and that the new firm should take the assets of the old firm and pay its debts, and credit the old firm with the surplus, if any.

[JAMES, L.J.:—The testator only authorized his trustees to carry on the business; he did not authorize a sale of the assets.]

He must have intended that the new firm should take the assets of the old firm; he authorized the carrying on of the business in conjunction with any partner. The intention was that the executors should give up their right to the assets and take the covenant of the new firm to pay the debts of the old firm. *Buckley* was an active party to the transaction by not insisting, as he might

(1) 12 Ch. D. 917. (2) Law Rep. 8 Ch. 1026.
(3) Law Rep. 9 Ch. 572.

have done, on the sale of the property under the trust for sale in the will. Each of the trustees and executors thus took an active part in the carrying on of the business, and this distinguishes the case from *Ex parte Morley* (1) and *Ex parte Dear* (2).

But, even if there was no change of the property in the assets, still the creditors of the new firm are entitled to them, on the ground that they remained in the order and disposition of the new firm with the consent of the true owners, the creditors of the old firm: *Kitchen* v. *Ibbetson* (3); *Fox* v. *Fisher* (4); *Ray* v. *Ray* (5). The bank have stood by, and have allowed the business to be carried on, and now they claim all the assets which are available for the creditors of the new firm. This they cannot do.

Herschell, Q.C., and *Smyly*, for the bank, were not heard.

JAMES, L.J.:—

We start with this, that what was done was not authorized by the will. There was nothing in the will which authorized two of the executors to take the testator's assets for their own benefit. The carrying on of the business by the widow and the son was clearly not authorized by the will. They, however, carried on the business, and at the time of their liquidation there still remained in specie some of the joint assets of the old firm upon which the creditors of that firm can lay their hands. *Ex parte Morley* is really a decision that such assets under such circumstances belong to the joint creditors of the old firm. If any question of order and disposition could arise the point would certainly have been taken in *Ex parte Morley*, but it was not. The decision of the Chief Judge must be affirmed.

BAGGALLAY, L.J.:—

Mr. *Ambrose*, in opening the appeal, put the question as being whether the present case is like *Ex parte Morley* or *In re Simpson?* (6) That is the real question, and I am unable to see any difference between the present case and *Ex parte Morley*. In

(1) Law Rep. 8 Ch. 1026.
(2) 1 Ch. D. 514.
(3) Law Rep. 17 Eq. 46.
(4) 3 B. & A. 135.
(5) Coop. G. 264.
(6) Law Rep. 9 Ch. 572.

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In re Simpson (1) the partnership deed itself provided that on the death of a partner the whole interest in the assets should pass to the survivors.

COTTON, L.J.:—

The question is, whether there has been any effectual bargain to change the property in question into assets of the new firm, and, if any such bargain was in fact made, we must see whether it was made by persons competent to make it. Assuming that such a bargain was made, of which I am by no means satisfied, what the executors did was not authorized by the will. *Ex parte Richardson* (2) is an authority against the Appellant, for there it was held that, where an executrix had carried on her testator's business in partnership with his former partner, and had made use of the testator's assets in the business to an extent not authorized by the will, she, on behalf of the testator's estate, might prove the excess so employed as a debt in the bankruptcy of herself and her co-partner. Here there are some things still in specie which were assets of the old firm, and it must be held that there was no effectual bargain to convert them into assets of the new firm.

Appeal dismissed with costs.

Solicitors for Appellant: *C. W. T. Yeilding,* agent for *Cobbett, Wheeler, & Cobbett, Manchester.*

Solicitors for Bank: *Phelps, Sidgwick, & Biddle,* agents for *Sale, Seddon, & Co., Manchester.*

(1) Law Rep. 9 Ch. 572. (2) Buck, 202.

CONYBEARE *v.* LEWIS.

C. A. 1880 Jan. 28.

[1879 C. 461.]

Practice—Appeal—Notice to discontinue Action.

A Plaintiff gave notice of appeal from the refusal of an injunction. Shortly afterwards the Plaintiff's solicitors wrote to the Defendants' solicitors to withdraw the notice of appeal. Two days after this the Plaintiff's solicitors gave the Defendants' solicitors notice of discontinuance of the action. The Defendants' solicitors declined to consent to the withdrawal of the appeal except on terms to which the Plaintiff's solicitors did not agree, and the appeal came on in its turn:—

Held, that the discontinuance of the action put an end to the appeal, and that no order could be made except to strike it out of the paper.

On the 19th of December, 1879, a motion by the Plaintiff for an injunction was refused by Vice-Chancellor *Malins*. The Plaintiff on the same day gave notice of appeal.

On the 10th of January, 1880, the Plaintiff's solicitors wrote to the Defendants' solicitors stating that it was not the Plaintiff's intention to proceed with the appeal, and withdrawing the notice of appeal. On the 12th of January they wrote again stating that the Plaintiff had decided not to proceed with the action, and giving them notice that they should discontinue the action from that date, and were prepared to pay the Defendants' taxed costs of action. After some correspondence the Defendants' solicitors wrote to say that they had no objection to the withdrawal of the notice of appeal on payment of the costs of each respondent, including the evidence filed since the date of the Vice-Chancellor's judgment. The Plaintiff's solicitors replied that the Defendants were not entitled to anything more than the taxed costs of the action up to the service of the notice to discontinue, that they (the Plaintiff's solicitors) could not consent to pay anything further, but that the matter must be left to the Taxing Master in the usual way. The Defendants' solicitors thereupon declined to consent to the withdrawing of the notice of appeal.

Rigby, for the Plaintiff.

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Higgins, Q.C., and *Whitehorne*, and *Glasse*, Q.C., and *Northmore Lawrence*, for the Defendants.

JESSEL, M.R. :—

Notice to discontinue the action having been given, the appeal comes to an end, and we cannot make any other order than to strike it out of the paper. The costs will go before the Taxing Master in the usual course, and any question as to the evidence filed since the judgment must be dealt with by him. We have no jurisdiction to make any order about it, there being no appeal before us.

BAGGALLAY and COTTON, L.JJ., concurred.

Solicitors : *Munns & Longden ; Hores & Pattisson.*

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HAWKINS *v.* HAWKINS.

[1877 H. 414.]

Debts—Dilapidations—Bequest of Leasehold—Cum onere.

22 Ch D 574

A testator specifically bequeathed certain personal estate upon trusts for *H.* and her children after payment thereout of a legacy and of his debts and funeral expenses, and bequeathed his residuary estate to the Plaintiff, whom he appointed his executor. Part of the residuary estate consisted of a leasehold house, held for a term at a rack rent and considerably out of repair. This leasehold being worthless, the Plaintiff, five months after the testator's death, surrendered it to the landlord, who would only accept a surrender on payment of rent for two and a half quarters from the testator's death and a sum for dilapidations. The residuary estate as a whole was valuable :—

Held (reversing the decision of *Malins*, V.C.), that the Plaintiff was not entitled to have the sums which he had paid to the landlord for dilapidations and for rent subsequent to the testator's death paid out of the specifically bequeathed property as being debts of the testator.

J. H. HAWKINS, by will dated the 3rd of December, 1862, bequeathed to *John Wailes* £1000, and bequeathed to *Sarah Hawkins*, after payment thereout of his lawful debts and funeral expenses and of the above legacy, all moneys belonging to him at his decease that might be in the hands of his agents, stewards, or

bankers, also all sums of money due to him at his decease, whether as rents or otherwise, also all stocks and shares that might be standing in his name at his decease, also all sums of money that might come to him after his decease by bequest or otherwise, that *Sarah Hawkins* might receive during her life the interest of the aforesaid moneys, &c., or of so much of them as might remain after payment of the aforesaid legacy of £1000 and of his debts and funeral expenses, and that at her decease the aforesaid sums of money, &c., or the residue thereof after payment of the said legacy and of his lawful debts and funeral expenses, should be equally divided among such children by him of the said *Sarah Hawkins* as might be then surviving. Subject to the legacies, bequests, and directions above-mentioned, the testator gave all his real and personal property to the Plaintiff, and appointed him sole executor.

The testator died on the 27th of June, 1877. The Plaintiff proved the will, and brought his action to have the property comprised in the bequest to *Sarah Hawkins* and her children ascertained, and if necessary to have new trustees of it appointed. At the trial on the 7th of December, 1877, a judgment was made directing accounts and inquiries, and, *inter alia*, an account of the testator's debts.

Part of the testator's residuary estate consisted of a leasehold house in *Regent's Park Road*, held at a rack rent of £130 for the residue of a term of twenty-one years from the 11th of August, 1865, with the usual covenants by the lessee to keep the property in repair. The testator also held a stable under an agreement for a lease for a term of eleven years from the 11th of August, 1875, at a rent of £27 10*s.* from the same landlord, the tenant being bound to repair.

These leasehold interests were pronounced by a surveyor to be of no value for purposes of probate, but the residuary estate as a whole was of considerable value.

Sarah Hawkins, who resided in the house, gave up possession shortly after the testator's death, and the Plaintiff was advised by his surveyors to make terms with the landlord for the surrender of the lease, allowing him a sufficient sum for putting the premises in repair. The Plaintiff accordingly treated with the landlord,

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who would only accept a surrender on the terms of the rent being paid up to Lady-day, 1878, and £140 being paid for dilapidations. The Plaintiff, under the advice of his surveyors, accepted these terms, and the lease and agreement were accordingly surrendered on the 26th of November, 1877, the Plaintiff paying

	£	s.	d.
2½ quarters rent from August 11, 1877, to March 25, 1878	98	8	9
5½ quarters garden rate to same time . .	3	1	5
And property tax deducted in error . .	0	9	10
	102	0	0
And for dilapidations	140	0	0
	242	0	0

The Chief Clerk in taking the accounts allowed this amount as a debt payable out of the property bequeathed to Mrs. *Hawkins* and her children. Mrs. *Hawkins* having died, her children applied to vary the certificate by reducing the amount to £62 1*s.* 2*d.*, which sum they were willing to allow. Vice-Chancellor *Malins* dismissed the application. The children of Mrs. *Hawkins* appealed.

Glasse, Q.C., and *Sturges*, for the Appellants:—

The residuary legatee takes this leasehold as part of the residue; if he accepts the residue he must take the leasehold, and is in the same position as if he had been a specific legatee of it. He must then take it *cum onere*, and bear all the liabilities accrued after the death of the testator: *Armstrong* v. *Burnet* (1); *Warren* v. *Rudall* (2). The only case cited against us below was *Martin* v. *Hobson* (3), and that is inapplicable. The dilapidations are a burden on the property and not a debt.

Higgins, Q.C., and *Cust*, for the Plaintiff:—

The leasehold was dilapidated at the testator's death, and his estate was liable for the repairs. This liability comes under the head of debts.

(1) 20 Beav. 424. (2) 1 J. & H. 1.
(3) Law Rep. 8 Ch. 401.

[JESSEL, M.R.:—It is a liability, but not properly a debt; the legatee must take the chattel as he finds it.

COTTON, L.J.:—Have you any authority to shew that during the continuance of the lease the sum requisite to put the property in repair could be recovered under the covenant?]

We admit that the authorities are the other way, but we contend that still this is a liabilty to be satisfied out of the assets. The testator's estate is also liable for the rent, though, no doubt, all rent received by the legatee must be set off against it.

JESSEL, M.R.:—

I think that the attention of the Vice-Chancellor cannot have been sufficiently directed to the facts, or he would not have decided the point without giving any reasons for his decision. There are only two subjects of dispute, the rent of a leasehold house which accrued due after the testator's death, and which, under the covenants in the lease, his estate was liable to pay, and dilapidations which are alleged to have accrued during the testator's lifetime. The leasehold house in question was included in the residue bequeathed to the Plaintiff, which residue the Plaintiff elects to accept. There was a specific gift to *Sarah Hawkins* for life, and after her death to her children, of certain property, subject to the payment of the testator's debts and funeral expenses and a legacy. The question is whether the liability of the testator's estate to pay the future rent, and its liability to damages for the dilapidations, are debts within the meaning of that clause as between the residuary and the specific legatees. I am of opinion that they are not. These are not debts, but liabilities. Under the covenant to keep the house in repair the testator's estate is liable to pay damages, the measure of which would be the damage done to the reversion by allowing it to be out of repair. This liability is not a debt. There are cases where the word "debts" has been held to include liabilities of this nature, as, for instance, in the case of a charge of debts on real estate, but not as between legatees. A specific legatee takes a property *cum onere*. No one would imagine that if a leasehold held for ninety-nine years was specifically bequeathed, the testator's estate is to pay the rent for the

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remainder of the term, so that the legatee would get it rent free. Does it make any difference that the leasehold is included in a bequest of the residue? If the residuary legatee accepts the residue, he accepts the leasehold which forms part of it, and it makes no difference that it is not specifically bequeathed to him. A similar question has often arisen about shares in companies, whether the legatee is liable to the calls, but it has never, so far as I am aware, been doubted that a legatee of a leasehold must bear the rent from the testator's death.

BAGGALLAY, L.J.:—

I am of the same opinion. The Plaintiff is sole executor and residuary legatee. The residue includes a leasehold which is a burdensome property, but on the whole the residue is valuable, and the Plaintiff has elected to take it. He now claims to have the arrears of rent which he has paid up to the time of surrendering the lease, and a sum paid for dilapidations accrued in the testator's lifetime, repaid out of a fund which is made the primary fund for payment of the testator's debts. The Appellant does not object to the payment of the rent up to the testator's death, and the Plaintiff clearly must bear the rent from that time. As regards dilapidations, they were a liability of the testator's estate, but were not a debt due at his decease. If an action were brought by the landlord at the expiration of the lease, the sum necessary to put the property in repair would be the measure of damages; but that would not be the case if an action were brought in the meantime. The Plaintiff, therefore, must bear the dilapidations.

COTTON, L.J.:—

All that we have to consider is whether the sums in question are debts within the meaning of the direction for payment of debts occurring in the specific gift in the testator's will. The question arises as between the specific legatee and the residuary legatee, who takes the leasehold as part of the residue. Strictly speaking, this liability for dilapidations is not a debt. In some cases such a liability may be held to be included in the word "debts," but not as between specific and residuary legatees. The question is not whether the executor would not have been held

justified in making these payments if there had been a deficient estate, but whether, there being a residue, they are payments which, as between the person taking the leasehold as part of the residue and the persons taking the property charged with the testator's debts, ought to be charged against the specifically bequeathed property, and I am of opinion that they are not.

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Solicitors: *Nicholl, Manisty, & Nicholl; H. Gething.*

In re CITY AND COUNTY INVESTMENT COMPANY.

C. A. 1879 FRY, J. *July* 15. C. A. *Nov.* 19

Voluntary Winding-up—Agreement for Sale of Business to another Company—Validity as against Creditors—Companies Act, 1862, *s.* 161.

An agreement under the 161st section of the *Companies Act*, 1862, entered into by a company about to be wound up voluntarily for the sale and transfer of its business to another company, is binding upon the creditors of the transferring company.

The remedy of a creditor who cannot get payment of his debt, is to obtain a winding-up order before the expiration of a year.

It is no objection to such an agreement that it contains a stipulation that the purchasing company shall take a portion only of the assets and liabilities of the transferring company, leaving the rest of the debts to be paid by the liquidator of the transferring company: or that it contains a stipulation that the shares in the purchasing company which are to be given as a consideration for the transfer shall be distributed directly among the shareholders of the transferring company, and not given to the liquidator as part of the assets in the winding-up.

If a liquidator in a voluntary winding-up desires to appeal from a decision of a Judge, he ought first to obtain leave from the Judge: otherwise, if his appeal fails, his costs may be refused out of the estate.

THE questions in this case arose in the winding-up of the *City and County Investment Company, Limited.*

By articles of agreement dated the 29th of April, 1872, and made between the *City and County Investment Company* and the *City and County Bank*, both of which were limited companies established under the *Companies Act*, 1862, it was agreed among other things:—

1. That the *Investment Company* should be forthwith voluntarily wound up, and the present directors, or some of them, appointed

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liquidators for the purpose of winding up its affairs and distributing the purchase-money and consideration for its property and effects thereinafter agreed to be sold to the *Bank*, and in distributing its other property and effects.

2. That the liquidators should sell to the *Bank* the business and goodwill of the *Investment Company*, and the securities, credits, balances, property, and assets thereof, subject nevertheless to the 15th article of the agreement, for the sum of £3000 sterling, and for shares in the capital of the *Bank*, the number of shares and the amount to be deemed as paid thereon to be determined according to the following articles:—

3. The liquidators shall receive two shares of £5 each of the capital of the *Bank* for each fully paid-up share of £10 (distinguished as A shares) in the capital of the *Investment Company*, and one share of £5 in the capital of the *Bank* for every fifty shillings which has been paid in respect of the shares issued of £10 in the capital of the *Investment Company* on which £1 only has been called, distinguished as B shares in the *Investment Company*, but on some of which B shares a further sum than £1 per share has been paid.

4. Each *Bank* share to be received by the creditors for or in respect of the A shares in the *Investment Company* shall on being issued by the *Bank* be credited with £2 10*s.* only as paid thereon, and each *Bank* share to be received by the liquidators shall be credited with £1 5*s.* only as paid thereon.

6. On the day on which the winding-up of the *Investment Company* shall commence the liquidators shall deposit with the *Bank* all the bills, notes, bonds, title-deeds, and securities whatsoever, held by or belonging to the *Investment Company*, and pay and transfer to the credit of the liquidators, on an account to be opened with them with the *Bank*, all balances then standing to the credit of the *Investment Company* or the directors thereof at any banking house, and the *Bank* shall on the day of the commencement of the winding-up of the said *Investment Company* also credit the said account of the liquidators with the said sum of £3000 purchase-money, and after the said winding-up shall have commenced all moneys received by the liquidators or their agents shall be paid into the said *Bank* to the credit of the said liqui-

dators. And it is hereby expressly declared that the said *Bank* shall have a lien or charge on all bills, notes, bonds, title-deeds, and securities so deposited, and on the property represented thereby, and on all moneys for the time being standing to the credit of the liquidators on their account with the *Bank*, as a security for the amount with which the *Bank* shares so to be issued by the *Bank* shall be credited on their issue.

8. The *Bank* shall not be obliged to undertake or take upon itself any of the debts, liabilities, or engagements of the *Investment Company;* but may undertake and take for its own benefit all such loans, bills, notes, and other business property, engagements and liabilities, of the *Investment Company*, as the *Bank*, or the directors thereof, may think fit, for such sum for and in respect of each separate loan, bill, &c., as may be mutually agreed upon between the *Bank*, or the directors thereof, and the liquidators; and all the debts, engagements, &c., which the *Bank*, or the directors thereof, shall not think expedient to undertake, or as to which they or the liquidators shall not mutually agree on the sum for which the *Bank* may undertake the same, shall be paid, discharged, settled, and wound up by the liquidators with all convenient speed.

9. As to such loans, bills, &c., as the *Bank* shall take or undertake, the respective sums at or for which the same shall be so agreed to be taken shall be carried to the said account of the liquidators at the *Bank*, and the liquidators shall, out of the sum for the time being standing to the credit of the said account, in the first place from time to time pay to the *Bank* all such sums as shall be necessary for paying or making up to the *Bank* for or in respect of the *Bank* shares so to be issued as aforesaid the aggregate amount of the sums with which the *Bank* shares shall have been credited on their issue, and after such aggregate account shall have been fully paid or made up to the said *Bank* in respect of the said shares, the liquidators shall from time to time, as and when they shall think fit, having regard to any outstanding engagements or liabilities of the said *Investment Company*, or of the liquidators in respect thereof, apply all or any part of the balance standing to their credit in further paying up of the several *Bank* shares so to be issued as aforesaid, until every *Bank* share so

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issued in respect of the A shares of the *Investment Company* shall be fully paid up, and every *Bank* share issued in respect of the B shares of the *Investment Company* shall be credited in the whole with £2 10*s.* as paid up: and the said several *Bank* shares shall from time to time carry *pro ratâ* dividends accordingly.

The 15th clause provided that the agreement was entered into subject to its approval and confirmation by a special resolution of the company.

A special resolution was duly passed by the *Investment Company* for the winding-up of the company, and approving of the above-mentioned agreement, and the winding-up was afterwards ordered to be carried on under supervision.

Subsequently the *Bank* was also wound up by order of the Court.

At the time when the *Bank* ceased to carry on business there was a large amount due from them to the *Investment Company* on the banking account.

The liquidator of the *Bank* claimed a lien upon this banking account to the amount of £3130 10*s.*, which represented the £2 10*s.* on each of the A. *Bank* shares, and £1 5s. on each of the B. shares.

The balance of current accounts taken over by the *Bank* from the *Investment Company* amounted to £2015 9*s.*

The deposits adopted and taken over by the *Bank* amounted to £1522 2*s.* 5*d.*

It appeared that all the *Bank* shares were issued direct to the shareholders.

Two summonses were taken out by the liquidator of the *Bank* and the liquidators of the *Investment Company*, for the purpose of determining the principle on which the accounts should be taken between them.

The liquidator of the *Bank*, besides the lien for the £3130 10*s.* which he claimed on the banking account, claimed to stand as a creditor against the assets of the *Investment Company* for the two above-mentioned sums of £2015 9*s.* and £1522 2*s.* 5*d.*

On the other hand, the liquidators of the *Investment Company* contended that the whole agreement was beyond the powers of the *Investment Company*, and was not binding on its creditors; and

they also claimed, if the agreement were supported, to stand as creditors against the *Bank* for £1999 3*s.* 8*d.*, being the balance unpaid of the sum of £3000 agreed to be paid by the *Bank* for the goodwill of the business.

The summons came on to be heard before Mr. Justice *Fry* on the 15th of July, 1879.

J. Pearson, Q.C., and *J. Beaumont*, for the liquidators of the *Investment Company*.

Glasse, Q.C., and *F. Dickinson*, for the liquidator of the *Bank*.

FRY, J.:—

There are two cross summonses before me, one taken out by the liquidator of the *Bank*, and the other by the liquidators of the *Investment Company*. The real object for which these summonses are taken out seems to me to be the determination of the footing on which the accounts ought to be taken under a certain agreement of the 29th of April, 1872.

There have been suggestions as to the agreement being *ultrà vires* and not binding upon the company. With regard to those questions I say nothing beyond this, that if the agreement is to be rescinded, it appears to me that it ought to be rescinded upon a substantive proceeding with that object; and that view has, I think with great propriety, been adopted by Mr. *Pearson*, and he has asked me really to determine the questions on the footing of the agreement.

If I am to determine it on the footing of the agreement, I am bound to determine it, as it seems to me, upon the whole agreement made between the parties. Whether the agreement is one which would have been binding upon creditors of the vendor company or not, is a question which I do not determine; but, looking to the extent to which the agreement has been carried into effect by the giving up of the whole goodwill and business of the one company to the other, and the mode in which the creditors have acted subsequently, it would certainly be a nice question whether the agreement could now be impeached or set aside. About that I say nothing, except that it is not now to be determined by me.

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[Mr. Justice *Fry* then considered the disputed questions of account and came to a conclusion in favour of the *Bank*.]

From this decision the liquidators of the *Investment Company* appealed. The appeal was heard on the 19th of November, 1879.

J. Pearson, Q.C., and *J. Beaumont*, for the Appellants:—

The argument before Mr. Justice *Fry* proceeded upon the footing that the agreement between the companies was valid, and that the only question was the construction of it. But we now contend that the agreement was *ultrà vires* and void.

In the first place, the agreement does not provide for a complete transfer of the assets and liabilities to the banking company, but allows the banking company to select such of the liabilities of the *Investment Company* as they please, and to pay them in full, and to leave the others unpaid. They have taken the bulk of the assets, and left no provision for the payment of several of the debts. This is an arrangement unfair both to the creditors of the *Investment Company* and to the shareholders, who are left responsible for the unpaid debts.

In the second place, the shares in the banking company are given to the shareholders of the *Investment Company*, and not to the liquidators, so as to become assets of the company.

But, independently of the particular provisions of the agreement, we say that it is not binding on the creditors of the *Investment Company*. They were not parties to it, and although it may be binding on the shareholders, there is nothing in the 161st section of the *Companies Act* which makes it binding on the creditors: *Ernest* v. *Nicholls* (1).

Glasse, Q.C., and *J. Dickinson*, for the banking company, were not called on.

JESSEL, M.R.:—

The question which we have to decide does not appear to have been fully argued in the Court below, and the judgment was based upon the assumption that the agreement was valid.

(1) 6 H. L. C. 401.

Now, the view we take of the matter is this: the 161st section of the Act empowers the liquidators of a company being wound up in voluntary liquidation to make certain arrangements by which they are to receive as compensation for the transfer of "the whole or a portion of its business or property to another company, shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or they may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company." Then there is a proviso making that binding on the members of the company being wound up. There are certain options given to the members who dissent, with which we need not trouble ourselves on the present occasion, and then there is a final proviso that, "if an order be made within a year for winding up the company by or subject to the supervision of the Court, such resolution shall not be of any validity unless it is sanctioned by the Court." Now the first objection taken to the arrangement made by the agreement is this: it is said that the agreement authorizes the purchasing company to collect some of the *Investment Company's* assets to pay some of their debts in full and leave others unpaid. It does appear to me that that is within the very words of the section: the purchasing company may either buy the whole of the business or a portion of the business. Of course, when a man or a company takes a transfer of all the assets, the man or the company taking the transfer covenants with the vendor to indemnify him against liability and to pay the creditors of the persons whose assets are taken over; it is the ordinary mode of transferring a business. If, instead of taking the whole, he only take a part, must he not indemnify in the same way in respect of the part transferred? Therefore it appears to me that what they propose to do is exactly within the powers of the Act.

Then it is said there is no provision made for the whole of the debts. If the banking company take only a portion of the debts, they are to arrange what portion of the debts are to be paid by the liquidator as a liability that they do not take over. That is

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expressly provided for by the 8th section of the agreement, the scheme being this—If you do not take it all, but select a part, you must agree how much of the assets you will have in respect of the part you take, and the remaining assets will remain with the liquidator, and be applied in respect of the debts and liabilities not taken over.

Looking at the agreement as a whole I can see nothing in it which does not appear to me a *bonâ fide* transfer of the business or the bulk of the business—in fact, as I am told, it is the whole of the business.

That being so, it is objected that the new shares are given to the shareholders direct, and not to the liquidator. The answer to this is, that this is the exact thing contemplated by the Act. It is perfectly well known that the liquidator will not take shares which are not fully paid up, and it is perfectly well known that nine times out of ten the custom is to give shares not fully paid up: therefore the Act does not say that the parties are to transfer to the liquidator, but "for the purpose of distribution amongst the members of the company being wound up, or they may enter into any arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company."

If the company really was insolvent, and the whole thing was a juggle and a fraud, I take it, both in law and in equity, the common law and the ordinary equity would be strong enough to meet that case. If it were not an actual fraud, but what is called a fraudulent preference, then the 164th section would meet the case. Therefore we have only one other question to consider, and that is the question of its being really *bonâ fide*, the parties making a mistake, thinking they have provided ample funds for the payment of the debts, and it turns out from some accident or mistake the fund was not adequate. Is there no remedy? Yes. The 161st section says, "If an order be made within a year for winding up the company by or subject to the supervision of the Court, such resolution shall not be of any validity unless it is sanctioned by the Court." The creditors must come within the year and get the winding-up order; and then the whole thing

goes for nothing if it is not sanctioned by the Court, and the Court would not sanction any arrangement by which the property was divided amongst the shareholders, leaving the creditors unpaid. That is quite consistent with the scheme of the Act. For after all what happens? When the old shareholders have transferred their shares to the new company, after a year they have ceased to be shareholders of the old company. Therefore it is putting the old shareholder in exactly the same position after the year, under the 161st section, in which an ordinary shareholder transferring a share is put under the 38th section, which makes the whole of the Act intelligible. That being so, and no creditor of this company having complained within a twelvemonth, and the voluntary winding-up being carried out, it appears to me the agreement is wholly valid, and is now unimpeachable. The consequence follows, that it must be treated as a valid agreement binding on every member of the company, and binding on the creditors by lapse of time; that is, they are unable to impeach the transfer of the shares or property by reason of the expiration of the year, and as between the companies it seems to me the account founded on the terms of that deed must be taken, having reference to its terms, as a valid agreement, and consequently they are entitled to prove for the sum they demand; and the decision in this case must be affirmed, and the appeal dismissed with costs.

JAMES and BAGGALLAY, L.JJ., concurred.

J. Pearson, Q.C., asked that the liquidator might take his costs out of the estate.

JESSEL, M.R.:—

That is an application which should be made to the Judge. You can get them under the supervision order from the Judge who has the conduct of the winding-up. In the Rolls Court I adopt the following practice: If a liquidator desires to appeal against an order of mine, and he wishes to be safe, he comes to me for leave to appeal, and if I think it is a proper case for appeal I give leave. If I think it is an improper case, then I direct it to stand over till I know what comes of the appeal. If he chooses to

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appeal without coming to me, and his appeal fails, as a general rule I refuse his costs. I am only following Lord *Romilly* in that. If there is a supervision order, the application would be made in Chambers.

James, L.J.:—

You must take out a summons, and apply to the Judge. We express no opinion adverse to your costs.

Solicitors for Appellants: *Learoyd, Learoyd, & Peace.*
Solicitors for Respondents: *Janson, Cobb, & Pearson.*

C. A. 1879 V.-C. H. *Nov.* 29. C. A. 1880 *Jan.* 21.

In re EMMET'S ESTATE. EMMET *v.* EMMET.

[1879 E. 79.]

Will—Construction—Tenant for Life—Gift to Children—Period of Distribution—Class entitled.

Testator gave his estates, real and personal, upon trust to convert the personal, and after payment of debts, &c., to invest, and to permit *H. E.* during his life to receive the rents and income for his own benefit, and after his death, as to one undivided third part, for all the children of *H. E.* equally, the shares to be conveyed and paid to them as they should attain twenty-one, as to sons, and twenty-one or marriage as to daughters. There were clauses of maintenance, and accruer.

Testator gave another third part of the estates after the death of *H. E.* in favour of the children of his sister, and the remaining third part in trust for all and every the children of *G.*, the shares to be conveyed and paid at the ages and times above mentioned, and in case *H. E.* should die without children, the share given for them was to be divided between his sister's and *G.*'s children, as the two-thirds given to them. *H. E.* died a bachelor. At his death, *G.*, a widower, had two children. He married again, and when his eldest child attained twenty-one, he had six children, all of whom lived to attain twenty-one. Another child was born afterwards:—

Held, by *Hall*, V.C., and by the Court of Appeal, that the six children, or their legal personal representatives, were entitled to a moiety of the estates.

Berkeley v. *Swinburne* (1) explained.

EDWARD EMMET, who died in January, 1836, by his will, made in October, 1833, gave all his estates and effects, real and

(1) 16 Sim. 275.

personal, to trustees, upon trust to get in and convert his personal estate into money, and after payment of his debts, funeral and testamentary expenses, and of a legacy, to invest the residue, as in the will mentioned, and during the life of *Henry Emmet* to pay to or permit him to receive the rents of the real and the income of the personal estate for his own benefit, and after his decease upon trust to stand possessed of one undivided third part of the real and personal estates in trust for all and every the children of *Henry Emmet*, to be equally divided between them, as tenants in common, the shares of such of them as should be sons to be conveyed, assigned, paid or transferred to them when and as they should respectively attain the age of twenty-one years, and the shares of such of them as should be daughters to be conveyed, assigned, paid or transferred to them when and as they should respectively attain the age of twenty-one years or marry with the consent of their guardians: and he declared that in case any of the children of *Henry Emmet* should be under age at the decease of the survivor of *Henry Emmet* and the testator, the rents and income of the share or respective shares of such child or children respectively, or any part thereof, should or might be applied towards their maintenance, education and advancement, and he directed that the surplus, if any, should be accumulated and become part of the original shares; and that if any of such children, being a son or sons, should die before he or they should attain the age of twenty-one years, and without leaving issue, or being a daughter or daughters, should die before she or they should attain the age of twenty-one, and without having been married, the share or shares, as well original as accruing, of him, her, or them so dying should accrue to the survivors or survivor or others or other of such children, and be equally divided between them as tenants in common, and be conveyed and paid, &c., as above mentioned: and after declaring a like trust, after the decease of *Henry Emmet*, as to one other undivided third part of the said estates in favour of the children of his sister, the wife of *J. Hardwick*, the testator directed that the trustees should, after the decease of *Henry Emmet*, stand possessed of the remaining undivided third part of the estates in trust for all and every the children of his brother *George Nelson Emmet*, to be equally divided between them, if more

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than one, as tenants in common, and if there should be but one such child, in trust for such child, the shares or share of such children or child to be conveyed, assigned, paid or transferred to them or him at the same ages and times and with the like power of advancement and benefit of survivorship and other trusts and powers as were declared concerning the children of his brother *Henry Emmet*. But in case *Henry Emmet* should die without leaving any child or children him surviving, or in case there should be such, and such child or all such children should die before he, she, or they, being a son or sons, should attain the age of twenty-one years, and without leaving issue, or, being a daughter or daughters, should attain that age or be married, then after his decease and the decease of the said *Henry Emmet*, and such failure of children and issue, the trustees were to stand possessed of the said undivided third part given for such children in trust, as to one undivided moiety thereof, for all and every the children of his sister, the wife of *J. Hardwick*, and as to the other undivided moiety, in trust for all and every the children of his brother *George Nelson Emmet*, to be equally divided between them respectively as tenants in common: the shares of the children to be conveyed and paid, &c., to them at the same ages and times and with the like power of advancement, &c., as above declared concerning the share of the children of *Henry Emmet* in the same undivided third part and the income thereof.

Henry Emmet died in 1839 a bachelor. At the time of his death, *George Nelson Emmet* was a widower with two children, viz., *Charles A. Emmet* and *Robert A. Emmet*, neither of whom had attained the age of twenty-one years.

In April, 1840, *George Nelson Emmet* married, and by such second marriage had issue five children, four of whom were born before *Charles A. Emmet* attained the age of twenty-one years, and one was born after he attained that age, and these five children, all surviving, had attained the age of twenty-one.

Robert A. Emmet attained twenty-one years, and died in July, 1865, leaving a will by which he appointed *Eliza Emmet* and *Charles A. Emmet* his executors.

The Plaintiffs, who were the four eldest children of *George Nelson Emmet* by his second marriage, claimed that it might be declared

that, on the true construction of the will, they and *Charles A. Emmet*, and the legal personal representatives of *Robert A. Emmet*, were entitled in equal sixth parts to one moiety of the estate of *Edward Emmet*.

The case came on before Vice-Chancellor *Hall*, on the 29th of November, 1879, upon motion under Order XL., rule 11., of Rules of Court, 1875.

Hastings, Q.C., and *Rigby*, for the Plaintiffs, submitted that the children of the second marriage who were born before *Charles A. Emmet* attained the age of twenty-one, and had themselves attained the age of twenty-one, were entitled to shares of the estates as well as *C. A.* and *R. A. Emmet*, who were the only children of *G. N. Emmet* living at the death of the tenant for life. They referred to *Andrews* v. *Partington* (1), *Robley* v. *Ridings* (2), *Davidson* v. *Dallas* (3), *Oppenheim* v. *Henry* (4), *Berkeley* v. *Swinburne* (5), *Gillman* v. *Daunt* (6), and *Clarke* v. *Clarke* (7).

Robinson, Q.C., and *W. W. Cooper*, for the Defendant *Charles A. Emmet*, submitted that the rule was that where there was a tenant for life, interests vested, and the postponement of payment merely, although there was a gift over in the event of death under the age of twenty-one years, the death of the tenant for life was the period at which to ascertain the class entitled, and that in this case the children born after the death of *Henry Emmet* were not entitled to shares of the estates. To decide in favour of the Plaintiffs would be to overrule *Berkeley* v. *Swinburne*. They referred to *Kevern* v. *Williams* (8) and *Re Partington's Trust* (9).

Dundas Gardiner, for the Defendant *Eliza Emmet*, and

W. Pearson, Q.C., for the trustees of the testator's will.

Hastings, in reply, commented upon the observations in *Berkeley*

(1) 3 Bro. C. C. 402.
(2) 11 Jur. 813.
(3) 14 Ves. 576.
(4) 10 Hare, 441.
(5) 16 Sim. 275.
(6) 3 K. & J. 48.
(7) 8 Sim. 59.
(8) 5 Sim. 171.
(9) 3 Giff. 378.

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v. *Swinburne* (1), and submitted that the decision of the case was in favour of the Plaintiffs.

HALL, V.C.:—

I am of opinion that six of the children of *George Nelson Emmet*, or the legal personal representatives of any of them who have died, are entitled to share in the distribution of these estates. The rule which permits any future born child to be let in until the time when one child attains the age at which he is entitled to call for an actual payment over of his share, may, as Lord *Loughborough* said in *Andrews* v. *Partington* (2), occasion wonder to any person who is not trying a case according to legal decisions. The case before Lord *Loughborough* had reference to a settlement; but his Lordship said, "Where a time of payment is pointed out, as where a legacy is given to all the children of *A.* when they shall attain twenty-one, it was too late to say that the time so pointed out shall regulate among what children the distribution shall be made. It must be among the children *in esse* at the time the eldest attains such age. He had often wondered how it came to be so decided, there being no greater inconvenience in the case of a devise than in that of a marriage settlement, where nobody doubts that the same expression means all the children." Whether any one can or cannot understand the rule, it is one founded upon convenience: as it would not allow the going beyond the particular time when one of the children could say "actually pay me over my share." That being so, it applies apparently as much to the case of a preceding life interest, as to any other. The rule stated in *Andrews* v. *Partington* applies to a case which is substantially one of a prior life interest, so as to let in those who may be born after a preceding life interest. That rule is in accordance with what was stated by Vice-Chancellor *Wood* in *Gillman* v. *Daunt* (3), and I consider that that was a declaration by him that he understood the rule to apply to a preceding life interest as well as where there is not one. The Vice-Chancellor looked at the period for the actual division of the fund. That being the law according to the authorities referred to, and

(1) 16 Sim. 284, 285. (2) 3 Bro. C. C. 404.
(3) 3 K. & J. 48.

also, as I think, according to the case of *Robley* v. *Ridings* (1), what are the authorities in opposition to it? The authorities seem to me to amount to this: that where, upon looking at the whole will, the testator must be considered to have made it upon the basis or footing of adopting or taking a certain time as the period of distribution or division, the Court must, taking that period, construe the will accordingly, although possibly it is not the period for the actual distribution of the fund; but for the purposes of the will it must be taken to be so; therefore the class living at the period take. That was the decision in the case of *Davidson* v. *Dallas* (2). I think the same observation is justly applicable to the case of *Berkeley* v. *Swinburne* (3), looking at the decision there come to.

In *Kevern* v. *Williams* (4), the report of which has been observed upon, there was an attempt at making a qualification by rejecting the trust which was bad, and retaining that which was good.

Upon the whole, I am of opinion that in this case the ordinary rule must be applied, and therefore I hold that children of *George Nelson Emmet* who were born before the eldest attained the age of twenty-one years, or their legal personal representatives, are entitled to shares of these estates.

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Charles A. Emmet appealed. The appeal came on among the appeals from orders on interlocutory motions on the 20th of January, 1880.

Robinson, Q.C., and *W. W. Cooper*, for the Appellant:—

[JESSEL, M.R.:—This is a final order, and the appeal ought not to have come on among appeals from orders on interlocutory motions, but as you are here we will hear you.]

We contend that the case is governed by *Berkeley* v. *Swinburne*, and that where there is an estate for life the class must be ascertained at its determination.

[JESSEL, M.R.:—The Court there held that on that particular

(1) 11 Jur. 813.
(2) 14 Ves. 576.
(3) 16 Sim. 275.
(4) 5 Sim. 171.

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will the death of the mother was to be takan as the period when the fund became divisible. Four circumstances were relied on of which only one occurs here.]

Davidson v. *Dallas* (1) is in our favour.

[JESSEL, M.R.:—The rule applicable to these cases had not then been settled: it is stated in *Gillman* v. *Daunt* (2).]

Kevern v. *Williams* (3) is in favour of ascertaining the class at the death of the tenant for life.

Hastings, Q.C., and *Rigby*, *contrà*, were not called upon.

JESSEL, M.R.:—

The present appeal is from a decision of Vice-Chancellor *Hall* on the construction of a will, which appears to me as clearly and well drawn as any will need be. Under that will any layman would understand that all the children of *George Nelson Emmet*, at whatever time they were born, would become entitled, and in the absence of authority so should I. There has, however, been established a rule of convenience, not founded on any view of the testator's intention, that since when a child wants its share it is convenient that the payment of the share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund. The rule is, that, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, the class shall become incapable of being increased. That rule of convenience, being opposed to the intention, is not to be applied where it is not necessary, there being also a rule that you let in all who are born up to the time when a share becomes payable. That rule is admitted in *Berkeley* v. *Swinburne* (4). Now what is the period of division in this will? No son is to take till twenty-one; no daughter till twenty-one or marriage. The period of division, therefore, is when any son attains twenty-one or any daughter attains twenty-one or marriage. That is the period when the fund is to be divided, and according to the rule of convenience to which I have referred

(1) 14 Ves. 576.
(2) 3 K. & J. 48.
(3) 5 Sim. 171.
(4) 16 Sim. 275.

children born after that time are to be excluded. This the Vice-Chancellor did. The present appeal is brought because in *Berkeley* v. *Swinburne* (1), on a will materially different from the present one, though somewhat similar to it, the Court came to the conclusion that the death of the tenant for life was the period of division. Four grounds are given for the decision (2). "The original gift to the children, the gift over and the clauses for their maintenance and advancement, are all of them inconsistent and incompatible with the death of the tenant for life not being the period of division." The Lords Commissioners decided on the ground of four clauses, three of which are absent from the present will, that the death of the tenant for life was the period of division. With all respect to them, I should not have decided so on that will, and I have some doubt whether they meant finally to decide it, for they made an order without prejudice to the question what shares the children might eventually take. When the case finally came before the Vice-Chancellor to decide that question he considered himself bound by the decision of the Lords Commissioners, and did not give any independent opinion of his own. Whether they meant to say all they are reported to have said about the actual point is not to my mind clear. If that case establishes anything it only establishes this, that according to the true construction of that particular will the death of the tenant for life was the period of division; and if so, there was no ground for resorting to the rule of convenience. In the present case there is no reason for doubting that, apart from that rule, all the children would take.

BAGGALLAY, L.J.:—

I am of the same opinion, and will only add that I entirely agree with the statement near the close of the Vice-Chancellor's judgment as to the result of the authorities.

COTTON, L.J.:—

I think that in the case of *Berkeley* v. *Swinburne*, the Lords Commissioners never meant to decide that because there is a tenancy for life the determination of that estate must be taken as

(1) 16 Sim. 245. (2) 16 Sim. 284.

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the period after which the class cannot be increased, although the fund is not divisible till a later period. If they intended to deal with the question now before us, all they decided was that under that particular will the testator had fixed upon the determination of the tenancy for life as the time after which the shares should not be capable of diminution.

Solicitors: *Vallance & Vallance*; *Emmet & Son.*

EMMINS *v.* BRADFORD.

[1876 E. 93.]

JOHNSON *v.* EMMINS.

[1877 J. 95.]

M. R.
1880
Jan. 14.

Marriage Settlement—Wife's Property—Children of former Marriage—Words "die without ever having been married"—Absence of Context.

By a settlement on the marriage of a widow, containing a recital that she had three children by her former marriage but no other reference to such children, the trust property was settled, in the events which happened, in trust, subject to her life interest, for the persons who would have been entitled thereto if she had died possessed thereof "without ever having been married." She died leaving the said children surviving:—

Held, that the property went to the persons who would have been entitled thereto if she had died a spinster.

Wilson v. *Atkinson* (1) explained.

In re Ball's Trust (2) and *Upton* v. *Brown* (3) disapproved.

THE question in this case arose on the construction of a settlement made on the marriage of *J. H. Bentley* and *Harriet Johnson*, widow of *Thomas Johnson*, and dated the 20th of November, 1859. The settlement contained a recital that the said *Thomas Johnson* had died intestate, leaving *Harriet Johnson* and four children him surviving, and that one of them had since died an infant and unmarried, also that *Harriet Johnson* was entitled to the property therein mentioned, and that on the treaty for her marriage with *J. H. Bentley* it had been agreed that the same should be settled upon the trusts thereinafter mentioned. The said property was then settled, subject to the life interest of *Harriet Johnson* and to a power of appointment which she did not exercise, and to provisions for the children of the then intended marriage, "In trust for the person or persons who, by virtue of the statute for the distribution of the estates of intestates, would have been entitled thereto in case the said *Harriet Johnson* had died absolutely possessed thereof without ever having been married."

(1) 4 D. J. & S. 455. (2) 11 Ch. D. 270.
(3) 12 Ch. D. 872.

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The settlement contained no reference to the children of the former marriage, except in the recital before mentioned.

Harriet Bentley (formerly *Harriet Johnson*) survived her second husband, and died on the 2nd of July, 1864, having had no children by that marriage, and leaving the said three children by her first marriage her surviving.

There were two actions in relation to this settlement, and the question now before the Court was whether, under the limitations in the settlement, the persons who would have been next of kin of *Harriet Bentley* if she had died a spinster and unmarried, and who were represented by the Plaintiffs in *Emmins* v. *Bradford*, were entitled to the settled property, or whether the surviving children of the first marriage were entitled thereto.

Bagshawe, Q.C., and *Haughton*, for the Plaintiffs in *Emmins* v. *Bradford*:—

Under the settlement the settled property was to be "in trust for the person or persons who, by virtue of the statute for the distribution of the estates of intestates, would have been entitled thereto in case the said *Harriet Johnson* (afterwards *Harriet Bentley*) had died absolutely possessed thereof without ever having been married." These words, we submit, are clear and free from ambiguity, and must be construed as referring to those who would have been her next of kin if she had died a spinster. If there had been any context pointing to the children of her first marriage, or shewing that the meaning was, if she had died without having a husband, it would have been different, but apart from such context, which does not exist in this settlement, the construction we contend for must prevail.

Ince, Q.C., and *Solomon*, for the children of the first marriage:—

In this settlement the words "without ever having been married," must be taken in a qualified sense. The recital in the settlement refers to the children of the former marriage as then surviving, which is a sufficient context to shew that the construction contended for on the other side is not the correct one. The object was to exclude the second husband, not the children of the former marriage.

In *Wilson* v. *Atkinson* (1), where property belonging to a widow, who had an illegitimate daughter, was on her second marriage settled upon trust, in the events which happened, on her death, for such person or persons as under the statutes for the distribution of the estates of intestates would have become entitled thereto at her decease, "if she had died possessed thereof intestate and without having been married," with a declaration that the illegitimate child should, for the purposes of the trust, be deemed to be her lawful child,—it was held that the trust for the next of kin could not be construed to exclude the said daughter, and that she was entitled to the property. The fact of the instrument being in form a marriage settlement was evidently treated by the Court as being a sufficient context to justify the construction which was adopted by the Court, even apart from the clause referring to the illegitimate child.

In the recent case of *In re Ball's Trust* (2), where, under a marriage settlement, the trust funds were, in the event of the husband surviving, to go as if the wife had died possessed thereof intestate and without having been married, and she died leaving her husband and one child surviving, Mr. Justice *Fry* considered that the case was covered by the decision in *Wilson* v. *Atkinson*, and that the child was entitled. *Upton* v. *Brown* (3), before the same learned Judge, was a similar decision.

On the authority of these cases we contend that the children of *Harriet Bentley* by her first marriage are entitled, which construction appears to be most in accordance with the spirit and meaning of the settlement and the intention of the parties.

JESSEL, M.R.:—

To my mind—apart from some recent authorities which I will mention presently—plainer words, or words that are less ambiguous, could not have been used. A woman who dies "without ever having been married," means a woman who dies without having had a husband.

In this construction I am confirmed by what fell from Lord *Cranworth* in his speech in moving the judgment of the House

(1) 4 D. J. & S. 455. (2) 11 Ch. D. 270.
(3) 12 Ch. D. 872.

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of Lords in *Clarke* v. *Colls* (1). There the contest was as to the meaning of the word "unmarried." The words were, "in case she had died intestate and unmarried." Lord *Cranworth* says (2): "What is the meaning of the word 'unmarried'? It may, without any violence to language, mean either 'without ever having been married,' or 'not having a husband living at her death'"; so he uses the very expression, "without ever having been married," as the proper English phrase to shew the one alternative as contrasted with the other alternative, and to express the idea of the death of a woman who had never had a husband.

Lord *Wensleydale* says (3): "The word 'unmarried' in this sentence is no doubt capable of two different constructions: it may mean either 'never having been married' or 'not being married,' that is, being 'a widow' at the time of her death." Then the context must determine in every case in what sense the word was used.

In the present case, therefore, I say that plainer or clearer words standing alone cannot be penned. Consequently, you must, if they are to be read otherwise than as Lord *Cranworth* used them, find something in the context to shew that the framers of the settlement used the words in some other than their ordinary sense. A context may shew that words have been used in other than their ordinary meaning. Here I can find no such context. There is a recital, no doubt, which shews that the lady at the time of her second marriage had children living by her former husband, but there is not a word in the trusts referring to those children. I cannot rely upon the recital only as a sufficient context to alter the plain meaning of the words. In fact, the point would not have been arguable but for the decided cases to which I have already referred. Now, as to these, the House of Lords has laid down in *Jenkins* v. *Hughes* (4) and other cases, that, on a question of construction, one Court is not bound by the construction put upon a similar instrument by another Court, unless some principle of construction is laid down, even though the words may be identically the same.

The first case cited on behalf of the Defendants was *Wilson* v.

(1) 9 H. L. C. 601.
(2) Ibid. 612.
(3) 9 H. L. C. 615.
(4) 8 H. L. C. 571.

Atkinson (1). Upon the principle of *Jenkins* v. *Hughes* (2), I am not bound by the decision of the Court of Appeal in that case even if I disagreed with it, which I do not, for it was a mere case of construction. In that case both the Lords Justices relied upon a particular context as shewing that it was improper to attribute the proper meaning to the words "without having been married." Lord Justice *Knight Bruce* said that the point which the Court had to determine was whether the words "without having been married" ought to be read "without having been married to any one," or, "without having been married to her then intended husband." He then adds: "The context forbids the first of these constructions." Lord Justice *Turner* says: "All these trusts arise under one series of declarations, and the whole must be taken together." Thus both judgments treat the decision as depending upon a context, so that the authority is reduced to one merely of construction. Unfortunately what the context so relied on was does not appear in the report. It does, however, appear that there was a context, I mean the clause with reference to the illegitimate child which justifies the decision; but it is evident that some other context was relied on by the Court. I cannot accede to the argument that the mere fact of the settlement being in form a marriage settlement could have been the only context besides the clause I have just mentioned.

The next case referred to was *In re Ball's Trust* (3), where Mr. Justice *Fry* came to the conclusion that *Wilson* v. *Atkinson* laid down a principle of construction, and although he appears to have doubted the principle, he considered he was bound to follow it. The true answer to this is that there was really in that case no decision except upon the particular context, and neither of the Lords Justices laid down any general rule of construction. Then in the case of *Upton* v. *Brown* (4), Mr. Justice *Fry* seems again to have found a general rule in *Wilson* v. *Atkinson* which, in my opinion, was not laid down by the Appeal Court, and having found the rule he followed it, this time apparently without the doubt he expressed in the former case of *In re Ball's Trust*. But, as I have already shewn, no general rule was so laid down. This exhausts

(1) 4 D. J. & S. 455.
(2) 8 H. L. C. 571.
(3) 11 Ch. D. 270.
(4) 12 Ch. D. 872.

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the authorities; until, therefore, a higher Court lays down some new general principle of construction, I shall not interfere with unambiguous words.

In the present case I rest my decision upon this, that the words are free from ambiguity, and that there is no context whatever to control them. It is said that you must look at the spirit and meaning of the instrument, but I have nothing to do with the intention of the parties not expressed, but with the plain meaning of the words used. Besides, I see no argument which can be raised either way on the question of rationality. There is nothing irrational or capricious in the construction which I have put upon the settlement, and I give judgment accordingly in favour of the Plaintiffs in *Emmins* v. *Bradford*.

Solicitors: *D. W. B. Leathley; Elmslie, Forsyth, and Sedgwick.*

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[1879 H. 510.]

Jurisdiction—Prohibition—Injunction — Justices of the Peace—Restraining Proceedings—Multiplicity of Actions—Land Drainage Act, 1861 (24 & 25 *Vict. c.* 133), *ss.* 72, 73, 76—*Judicature Act*, 1873, *s.* 24, *sub-s.* 7; *s.* 25, *sub-s.* 8.

15 CD 115
16 Ch D 145
17 Ch D 467
18 Ch D 607
20 Ch D 190
145-67
11 QBD 347
40

The jurisdiction to grant prohibition is now conferred by the Judicature Acts upon every Judge of the High Court; but, inasmuch as one of the main objects of the Acts (*Judicature Act*, 1873, s. 24, sub-s. 7) is to enable the Court to decide, if possible in one proceeding, all the questions in dispute in the same matter and between the same parties, and (*Judicature Act*, 1873, s. 25, sub-s. 8) to grant an injunction in all cases in which it shall appear to the Court "just and convenient" so to do, the Court may, in any case in which it has power to grant prohibition, grant an injunction to restrain the proceedings in the inferior Court.

For instance, the Court will grant an injunction to restrain a landowner from taking proceedings before justices of the peace on an irregular notice under sects. 72 and 73 of the *Land Drainage Act*, 1861 (24 & 25 Vict. c. 133).

Quære, whether, under the *Land Drainage Act*, 1861, the justices of the peace have any jurisdiction to decide questions as to the validity of any notice served under sects. 72 and 73 of the Act.

Semble, the only questions they are authorized to decide (sect. 76) are

(1.) Whether the proposed drainage works will cause any injury to the land on which they are proposed to be constructed; and (2.) Whether the injury (if any) can be fully compensated in money.

THE Plaintiffs and the Defendant were the owners in fee simple of adjoining freehold estates in the county of *Northumberland*.

The Defendant, in proceeding to make certain drainage works on his estate, proposed, by putting in force the powers given to landowners by the *Land Drainage Act*, 1861 (24 & 25 Vict. c. 133), to utilize and improve for the purpose a burn or watercourse which flowed through the Plaintiffs' land. Accordingly the Defendant, on the 4th of November, 1879, served upon the Plaintiffs a notice stating that he proposed to lay a barrel or pipe drain from his land along and under the bed of the burn, and to make the necessary excavations for the purpose, ultimately restoring the bed of the burn to its original level, except in certain parts which he proposed to deepen. The notice did not in terms "apply for leave" to make the drain on the Plaintiffs' land, as required by sect. 72 of the Act, but offered to pay compensation under sect. 74, sub-sect. 3.

The notice was accompanied by plans of the proposed drain, but they did not shew that the drain was intended to follow the course of the burn, and they were in other respects defective and incorrect.

Before giving the notice the Defendant had already, without the Plaintiffs' leave or knowledge, entered upon their land, and commenced making extensive excavations in the bed of the burn, though he had since withdrawn his workmen; but as he still intended proceeding under his notice the Plaintiffs issued a writ, and now moved for an injunction to restrain the Defendant from committing any further acts of trespass or waste upon the Plaintiffs' land, and from further interfering with the burn except pursuant to any order of the Court for restoring the same, and from taking any proceedings whatever before the justices of the peace under his notice, or at all events until he should have restored the burn pursuant to any order of the Court.

His Lordship held that, the Defendant not having conformed to the requirements of sects. 72 and 73 of the *Land Drainage Act*, the notice was bad, as was in fact admitted by the Defendant's

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counsel at the Bar; and the only question in the case calling for a report was whether the Court had jurisdiction to restrain the Defendant from proceeding before the justices under the 76th section of the Act, instead of leaving the Defendant to his remedy by prohibition.

Chitty, Q.C., and *F. H. Colt*, for the Plaintiffs, submitted that the Court had jurisdiction to grant the injunction, and thus decide all the questions between the parties; and they referred to *Lord Auckland* v. *Westminster Local Board of Works* (1), commented upon by his Lordship in *Kerr* v. *Corporation of Preston* (2).

Davey, Q.C., and *Bush*, for the Defendant:—

The 76th section of the Act expressly provides that the question of injury to the land by making the drains shall be decided by the justices in petty sessions. That being so, the Plaintiffs should not have come here to have the question decided. This is not the case of a railway company, where, no doubt, the Court would restrain proceeding under a wrong notice.

[JESSEL, M.R.:—From taking any step whatever towards taking the land under the notice.]

But the Court has so interfered because there is no special tribunal provided to meet the case, whereas in the present case the Legislature has expressly provided a tribunal which shall decide the questions at issue between the two landowners; for the 76th section says that the question of injury in proceeding under the Act "shall be decided by two or more justices in petty sessions assembled," unless the landowner on whose lands the drains are to be made requires arbitration.

The cases cited by the other side really have no application to this case. *Kerr* v. *Corporation of Preston* only had reference to the jurisdiction of the Court to restrain criminal proceedings, and in *Lord Auckland* v. *Westminster Local Board of Works* all the Lords Justices meant was that proceedings will be restrained unless they are legally taken: that is to say, persons or corporations will be restrained from doing an act which would in

(1) Law Rep. 7 Ch. 597. (2) 6 Ch. D. 463.

itself be unlawful unless sanctioned by an Act of Parliament, and unless the preliminaries prescribed by the Act were first complied with. Now the Defendant does not propose to do an unlawful act, but only to apply to the justices under this Act of Parliament, which he has a right to do. The justices can then decide as to the validity of the notice and all questions arising out of it: and if either party is dissatisfied with their decision there is the right of appealing in the usual way. The matter then being in the jurisdiction of the justices, this Court should not forestall their functions.

JESSEL, M.R. :—

The Defendant says the magistrates have jurisdiction to decide whether or not the notice is a good one; and that if they decide wrongly there is a right of appeal to Quarter Sessions, from the Quarter Sessions to one of the Divisional Courts, from the Divisional Court to the Court of Appeal, and from the Appeal Court to the House of Lords; and that that is the proper course to be pursued.

The Plaintiffs, on the other hand, say the whole matter is now before the Court with reference to the trespass on this land and to the Defendant's right to enter upon it. I say, first of all, that this is a case for an injunction even had it been a case before the passing of the *Judicature Act;* but, secondly, that if it had not been a case for an injunction before the passing of the *Judicature Act,* it certainly is such a case since the passing of that Act. On that point I am quite clear.

The question is really an important one, as regards the general law, whether the Court should interfere in such a case as this.

In the first place it must be remembered that one of the main objects of the *Judicature Act* was to enable the Court to decide, if possible in one proceeding, all the questions in dispute between the same parties relating to the same matters (*Judicature Act,* 1873, s. 24, sub-s. 7); and that is a very important provision. Here is a dispute for which an action has to be brought for trespass, and a further, or second, dispute relating to the same piece of land and to the same matter—the improvement of a drain—and both disputes are between the same parties. If I can pro-

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perly decide the second question in dispute in this action, it is, according to my view of the Judicature Acts, my duty to do so.

Can I then properly decide the question? The Defendant objects, in the first instance, to the jurisdiction: he says that the magistrates themselves have the jurisdiction to decide whether or not this is a proper notice. Now I will take it both ways: in the first place I will assume they have jurisdiction. There is nothing in the Act of Parliament to say that though the magistrates may decide the question when it comes before them, another Court may not. The magistrates' Court being an inferior Court, any person served with a bad notice may apply for a prohibition on the ground that there is no jurisdiction, and that prohibition may now be granted by any Judge of the High Court. If I can grant a prohibition I can of course grant an injunction between the parties.

By the 8th sub-section of the 25th section of the *Judicature Act*, 1873, it is provided that a mandamus or injunction may be granted by the Court "in all cases in which it shall appear to the Court to be just or convenient that such order should be made."

Now, if I have the power to grant prohibition in a particular case, it certainly is "just and convenient" to arrive at the same result by granting an injunction *inter partes*, instead of creating the great expense of granting a writ of prohibition against the magistrates.

In other words, the jurisdiction now conferred on every Judge of granting prohibition is a reason for granting an injunction which did not exist before the passing of the *Judicature Act*, and makes it just and reasonable to grant an injunction, which is a shorter and cheaper mode of attaining the same end and deciding the point between the actual parties in dispute.

So that, even if I were of opinion that it was clear the magistrates had jurisdiction, I should still say, looking at the policy of the *Judicature Act*, that I had jurisdiction to decide all the disputes between the parties relating to the same matter; and, looking to the powers given to the Court of granting an injunction wherever it is reasonable, that it is reasonable to exercise the power.

Look at the alternative: instead of my granting an injunction

and settling the question at once and for ever—subject, of course, to two appeals, one to the Court of Appeal and one to the House of Lords—the other result would be this: the parties would go before the magistrates at some expense; one would say, I object: either party who was dissatisfied would appeal to the Quarter Sessions, then there would be an appeal to the Divisional Court, then to the Appeal Court, and then to the House of Lords.

Now I must say that of the two courses, if I am to consider which is the more just and convenient, I have no hesitation in saying that it is both more just and more convenient that I should decide subject to two appeals only, which I think are amply sufficient for such a case as this. Therefore on that ground I should decide that this Court should exercise jurisdiction.

But I am by no means prepared to decide that the magistrates have jurisdiction in such a case as this: it appears to me that they have not. The service of the notice must be a service on the adjoining "owner." Suppose the question arose who was the owner. Is it to be supposed that two justices are to decide the question of ownership? All they are to decide is whether the proposed drain "will cause any injury to the adjoining owner," that is, to the land *quâ* land in ownership, "or to the occupier"; and secondly, whether the injury can be fully compensated in money. But if they are to go into the validity of the notice, they will have to inquire whether the person served is the owner or not; because it might be said, You have not served the right person; he is not the owner within the Act. Are they to try questions of litigated title? I think not.

Again, are they to decide—I do not say such a question is before me now—but are they to decide all the questions of the service of the notice, the validity of the notice, and so forth? I hardly think the Act was meant to call upon the magistrates to do more than decide the two points I have mentioned, whether the drain will cause an injury, and if so, whether the injury is the subject of money compensation. I can hardly imagine that it was intended that they should incidentally have a right to decide these other points. It seems to me that, the Courts being known to possess power of prohibition which can be evoked by either party, the Legislature left the parties to that remedy. I think

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that is the true view of the Act—that any person dissatisfied is to be left to apply to the Court for prohibition.

If that is so, then the Court of Chancery could have granted an injunction before the *Judicature Act;* because no person or corporation in attempting, under colour of powers conferred by the Legislature, to take possession of another's land, or to enter upon another's land, is entitled to take further proceedings with a view to perfecting his colourable title before any inferior tribunal. It is on that principle that the Court of Chancery restrains railway companies from assessing compensation before the jury when they have not given a good notice. It was sometimes said that a bad notice could not hurt you, because, although the compensation was assessed, the company could not take possession; but the answer is, the company are not, under colour of notice, to put the landowner to trouble and expense for nothing. It is an abuse of their powers, and the Court of Chancery will restrain them. It is hardly necessary to decide this, because I am quite clear, having regard to the principle of the Judicature Acts, that I have power to interfere; and therefore I shall grant an injunction to prevent the Defendant taking any proceedings under this notice.

Solicitors: *Nash & Field,* agents for *Hoyle, Shipley, & Hoyle, Newcastle-on-Tyne; Warry, Robins, & Burges.*

M. R. 1880 *Jan.* 24.

In re VOSS.

KING *v.* VOSS.

[1879 V. 6.]

Married Women's Property Act, 1870, *ss.* 7, 8—*Married Woman—Share under Intestacy—Personal Estate above* £200—*Separate Use—Separate Receipt—Examination unnecessary—Real Estate—"Rents and Profits," whether means Corpus.*

The limit of £200 fixed by sect. 7 of the *Married Women's Property Act,* 1870, applies only to money coming to the married woman by "deed or will," and not to personal estate to which she may have become entitled as next of kin of an intestate: consequently such personal estate, whatever may

be its amount or value, belongs, where unaffected by any settlement, to her for her separate use, and may be transferred or paid to her upon her separate receipt, without the necessity of any examination.

Quære, whether the 8th section does not apply to *corpus*, as the "rents and profits" therein mentioned are not limited to those arising during the life of the married woman.

A MARRIED woman, whose marriage took place after the *Married Women's Property Act*, 1870, was entitled, as one of the next of kin of the intestate in the action, to about £600 Consols, and the question arose whether it was necessary that she should be examined in Court to enable the stock, which was unaffected by any settlement, to be transferred into her name for her separate use, as the fund exceeded £200 in value.

The matter was now mentioned to the Court.

Gazdar, for the Plaintiff.

Solomon, for the Defendant.

JESSEL, M.R., thought that, having regard to the language of the 7th section and the provisions of the 8th, the Act intended the limit of £200 to apply only to money coming to the married woman by deed or will, and that, as regards personal property coming to her as one of the next of kin of an intestate, she was entitled to that for her separate use, whatever its amount or value might be, without the necessity of any examination. His Lordship said, however, that it was difficult to find a ground for the distinction.

His Lordship also observed that there might be a question whether the provision of the 8th section, that the "rents and profits" of property to which a married woman married after the Act was entitled as heiress should belong to her for her separate use, did not apply to the *corpus*, as the rents and profits were not limited to those arising during her life.

Order for transfer of the fund to the married woman on her separate receipt.

Solicitors: *W. H. Holland*; *Taylor & Jaquet.*

M. R.
1880
Feb. 6.

BIRMINGHAM ESTATES COMPANY *v.* SMITH.

[1879 B. 462.]

Practice—Pleading—Counter-claim—Reference to Statements in Pleadings—Judgment in one Division of the High Court not to be enforced without Leave of Judge in another Division—Motion to exclude Counter-claim.

A counter-claim may refer to statements of fact in the pleadings on which the Defendant relies without setting them out *in extenso*.

A Defendant mortgagee, in an action in the Chancery Division to set aside his mortgage, commenced an action in the Queen's Bench Division to enforce his security and obtained judgment, which was not to be enforced without the leave of the Judge of the Chancery Division. He then counter-claimed for leave to enforce that judgment, or in the alternative for judgment for what was due to him in respect of the mortgage.

On motion to exclude the counter-claim:—

Held, that, as no action could have been brought when judgment had already been obtained in the Queen's Bench Division, the counter-claim was wrong and must be struck out.

THE statement of claim in this action, which was commenced on the 11th of September, 1879, alleged that the Defendant had acted in the promotion of the Plaintiff company; that he had, in June, 1876, sold them certain property for the sum of £5750, which they alleged to be greatly in excess of its value; that immediately afterwards, by an indenture of the 26th of June, 1876, the same property had been mortgaged to the Defendant for £5500, with interest at 5 per cent.; and that certain persons, who were then directors of the Plaintiff company, had joined as sureties to secure the payment of the principal and interest. The Plaintiff company claimed a declaration that the purchase deed and the mortgage deed were fraudulent and void, and that the same might be set aside.

In October, 1879, the mortgagee commenced an action in the Queen's Bench Division against the Plaintiff company and the sureties to obtain payment of the said principal and interest. A summons was then taken out to have that transferred to the Chancery Division. Mr. Justice *Lindley* gave judgment for the mortgagee in the Common Law action, which was not to be enforced without the leave of the Master of the Rolls.

An order was subsequently made in Chambers by the Master of the Rolls that the sureties should be made parties to the action.

The Defendant then put in a statement of defence and counter-claim. By his counter-claim he referred to the statements in the pleadings in the following terms:—"By way of counter-claim the Defendant refers to the indenture of the 26th of June, 1876, in the pleadings mentioned, and to the 16th and 20th paragraphs of the statement of defence," and he claimed leave to enforce the judgment in the Queen's Bench Division, or (in the alternative) judgment for the moneys due to him under the said indenture.

The Plaintiff company now moved that the counter-claim might be excluded on the ground that the claim thereby raised ought not to be disposed of by way of counter-claim, or that the same might be struck out as calculated to embarrass the Plaintiff.

Brett, for the Plaintiff:—

This counter-claim is wrong in simply referring to the indenture of the 26th of June, 1876, "as mentioned in the pleadings," and to the paragraphs in the statement of defence. The Defendant ought, under Rules of Court, 1875, Order XIX., rule 10, to state specifically in the body of the counter-claim the facts on which he relies for relief: *Holloway* v. *York* (1); *Crowe* v. *Barnicot* (2); *Lees* v. *Patterson* (3).

[JESSEL, M.R.:—In *Holloway* v. *York* there was nothing to shew on what the counter-claim was founded, or where it began or ended. It is sufficient if the counter-claim states on what reliance is placed, or refers to the facts as in such and such paragraphs of the statement of defence. You need not set them all out over again.]

Secondly, I contend that the Defendant has already obtained judgment for the money due under the mortgage deed; he cannot, therefore, ask for any further judgment.

Ince, Q.C., and *W. P. Beale*, for the Defendant:—

As the sureties were not made parties to this action, it was

(1) 25 W. R. 627. (2) 6 Ch. D. 753.
(3) 7 Ch. D. 866.

M. R. 1880 BIRMINGHAM ESTATES COMPANY v. SMITH.

necessary to counter-claim for leave to enforce the judgment against them.

As your Lordship might decline to enforce the judgment in the Queen's Bench Division, the Defendant has in the alternative claimed a new judgment which we submit he is entitled to.

[JESSEL, M.R. :—A counter-claim can only be maintained where an action can be brought. Your original claim is extinguished by the judgment.]

We submit that we can abandon our judgment in the Queen's Bench Division.

JESSEL, M.R. :—

The Plaintiff company brought an action to set aside a deed under which they were liable to pay a large sum of money. The Defendant brought an action against the Plaintiff company, and also against some sureties, to recover the sum of money, and if this had been under the old practice, the Plaintiff company would have asked for an injunction to restrain the prosecution of that action until their equitable right to set aside the deed had been decided, and, if there had been a *primâ facie* case made, of course they would have had an injunction to stop the execution on the judgment. Under the new practice you cannot do that. You can only apply to the Court, where the action is, to stay the action, and consequently the Plaintiff company applied to the Division in which the action was brought—the Judge at Chambers being Mr. Justice *Lindley*—to stay the action. He said in effect: "You do not want to stay the action; all you want is to stay the judgment, that is, to put the Plaintiff in the Common Law action in the same position as he would have been in if he had obtained an injunction to restrain execution until the Equity suit had been decided;" and consequently he gave the Plaintiff in that action judgment, but with the restriction that he was not to enforce the same without the leave of the Judge of the Chancery Division to whose Court the Chancery action was attached.

That is exactly the order which would have been made in the Court of Chancery under the old practice, and puts the parties in exactly the same position. When the Chancery action is decided,

if it is decided in favour of the Defendant, he gets leave at the same time to enforce his judgment. Therefore, the moment I give him judgment in the Chancery action, if I do so, he will say, "Now give me leave to enforce my judgment," just as under the old system when the bill was dismissed the Judge at the same time gave leave to enforce the judgment. It appears to me that that is very likely to turn out a most useful innovation in practice, because it is cheaper than transferring the Common Law action, and it does exactly the same thing as that is intended to effect. But then by some mistake the Defendant puts in a counter-claim for leave to enforce the judgment. He has no business to put in a counter-claim except where an action can be brought. An action cannot be brought for this leave which is to be given in the original action. The counter-claim is not a proper way of asserting the Defendant's right, but an application to the Judge at the trial when he gives judgment: that is how it was done formerly, or if he forgot to apply at the time he might take out a summons afterwards.

Then the Plaintiff company object to the counter-claim not because this is not a proper subject of counter-claim, which is a new objection, but because they say the Defendant has no right to such relief, and he has not properly referred to the facts. Now I did not decide in *Holloway* v. *York* (1) that a counter-claim should do any more than state the facts properly on which the counter-claim was founded. I did not decide that they were to be stated all over again. A defendant bringing a counter-claim may say, "I rely on the facts stated in the 3rd, 4th, and 5th paragraphs of the statement of claim, and the 7th, 9th, and 11th paragraphs of the statement of defence." He need not print them all over again: it is quite enough if he refer to them, and thereupon counter-claims.

That is what the Defendant has done. He refers to "the indenture of the 26th of June, 1876, in the pleadings mentioned," and to certain paragraphs in the statement of defence, which is a very good and cheap way of stating his case—much better than setting it all out—and then he counter-claims in the alternative for what he certainly would have been entitled to if he had not

(1) 25 W. R. 627.

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got judgment in the Common Law action, namely, for the money due to him under the indenture. That alternative would be the subject of demurrer rather than of a motion to strike it out; but I think, looking at what has occurred, the right order is to strike out the counter-claim, and to make the costs costs in the action.

Solicitors for Plaintiffs: *Church, Sons, & Clarke*, agents for *E. Westwood, Birmingham.*

Solicitors for Defendants: *Whateley, Milward, & Whitehead*, agents for *Whateley, Milward, & Co., Birmingham.*

M. R.
1880
Feb. 23.

NOEL *v.* NOEL.

[1880 N. 5.]

Practice—Married Woman—Separate Defence—Special Leave—Security for Costs—Rules of Court, 1875, *Order* XVI., *r.* 8.

14 Ch D 421
9 Q B D 53
10 Q B D 18

A married woman cannot appear or defend separately from her husband without first obtaining special leave under Rules of Court, 1875, Order XVI., rule 8: an order for leave obtained upon a petition of course is irregular.

A married woman in receipt of a separate income of £1500 per annum was not required to give security for costs on obtaining leave to defend separately under Order XVI., rule 8.

IN this action a married lady, who had been made co-Defendant with her husband, had appeared separately from him, without having obtained any order giving her leave to do so. A summons was then taken out in Chambers by the Plaintiff to strike out her appearance, but it was refused by the Chief Clerk. The lady's solicitors then obtained an order giving her leave to appear separately. This order was made upon a petition of course presented by the lady without a next friend.

The Plaintiff now moved to discharge the order for irregularity, on the ground (1) that the petition ought to have been by a next friend, and (2) that under Order XVI., rule 8, of the Rules of Court, 1875, a married woman could not defend separately without the special leave of the Court.

It appeared that the husband and wife were living apart and

that the wife was in receipt of an annuity of £1500 under a separation deed.

Chitty, Q.C., and *Begg*, for the motion, submitted that the order was irregular for the reasons above stated, and that at all events the wife should be ordered to give security for costs pursuant to Order XVI., rule 8.

Romer, for the lady, asked for leave now to defend, if the former proceedings were irregular, but submitted that, as she had ample means, she ought not to be required to give security for costs.

JESSEL, M.R., said the lady ought to have obtained a special order before appearing, and that the order on the petition of course was irregular. He would now give the lady leave to defend separately, but, as she had ample means of her own, he should not require her to give security for costs.

Solicitors: *J. M. Maddox; Meynell & Pemberton.*

V.-C. M.
1879
Nov. 22, 24.

CIVIL SERVICE SUPPLY ASSOCIATION *v.* DEAN.

[1878 C. 133.]

Trade-Mark—Name—Neighbouring Shop—Evidence of Deception.

In a trade-mark case the fact that one person has been deceived is not conclusive as to the misrepresentation.

A tradesman may use a name, although he is aware that a neighbouring tradesman intends to use that name.

A bootmaker having a shop running up *Bedford Street*, with the front and entrance in the *Strand*, wrote up over his shop the words "*Civil Service Boot Supply.*" The *Civil Service Supply Association* were at that time building a large store at the other end of *Bedford Street*, in which when finished they opened a general shop, and they afterwards opened a boot and shoe shop in *Tavistock Street*, which was not far off. One of the customers of the Association had gone to the shop of the bootmaker, mistaking it for that of the Association. The Association brought an action to restrain the bootmaker from using the words :—

Held, that under the circumstances there was no intention on the part of the bootmaker to deceive, and that no rational person would have been deceived by the words so used ; and action dismissed.

THE *Civil Service Supply Association*, the Plaintiffs in this case, were a society carrying on business in *Queen Victoria Street, London ;* and they had until the year 1877 also carried on business in *Long Acre*, where they sold goods of many kinds.

None but holders of tickets from the Association could deal with the Association at their stores. They had made arrangements with various tradesmen in *London* for the supply to the ticket-holders of articles at a discount or lower price.

In 1875 they began to build for their business a very large store or shop for the sale of goods at the top of *Bedford Street, Strand*, which they opened in August, 1877 ; and in December, 1877, they opened a shop for boots and shoes in *Tavistock Street*, which was not very far from *Bedford Street*, they not having previously sold boots and shoes at their stores, though bootmakers connected with them had sold to ticket-holders of the Association boots and shoes at a discount.

The Defendant, *J. R. Dean*, was a bootmaker, having a shop at the bottom of *Bedford Street*, the side of the shop being in *Bedford Street* and the front with the entrance being in the *Strand*.

Early in or some time before the year 1877 the Defendant placed above his shop front in *Bedford Street* the words "*Civil Service Boot Supply*" in large letters, and the words "discount allowed" in small letters underneath; and he had also in his window a card with "*Civil Service*" in large letters, and "discount allowed" in small letters upon it.

The Plaintiffs brought an action against the Defendant, alleging that he put these words in and over his shop for the purpose of deceiving the customers of the Plaintiffs, and that he had diverted to his shop intending customers of the Plaintiffs; and the Plaintiffs claimed an injunction and damages.

The action came on for trial, when several persons who had made affidavits for the Plaintiffs were cross-examined. It was admitted that the words "*Civil Service*" were used by many other establishments in *London*. A Mrs. *Cellier*, a ticket-holder in the Association, did go into the Defendant's shop and buy some boots believing it to be the Association shop. The Plaintiffs had employed several persons as detectives to buy at the shop of the Defendant, but in the opinion of the Court it was not shewn that the shop of the Defendant had been represented to them as that of the Plaintiffs or as connected therewith.

The evidence of the Defendant was not opened.

Glasse, Q.C., and *B. B. Rogers*, for the Plaintiffs:—

No doubt if the Defendant's shop had been in a distant part of *London* the case might be different, but here he is at one end of a short street and the Plaintiffs are at the other end: *Lee* v. *Haley* (1); *Boulnois* v. *Peake* (2). The Defendant knew perfectly

(1) Law Rep. 5 Ch. 155.
(2) V.-C. Giffard, Mar. 19, 1868.

BOULNOIS *v.* PEAKE.

THE Plaintiffs were sellers of carriages by auction and on commission, and carried on their business in a part of the *Baker Street Bazaar* (*Baker Street* and *King Street*), where they had been established for forty years, and had standing room for 600 carriages. They had always used the title of "*Carriage Bazaar*," and headed their bills with these words, and the allegation in the bill was that no other establishment in *Baker Street* or *London* was known as "*The Carriage Bazaar*."

The Defendant, in January, 1868, took the house No. 24, *Baker Street*, and before opening it as a shop and standing place for carriages announced it on a board as a "*Carriage Repository*." In February, 1868, he had put up as

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well that the Plaintiffs were going to open a shop in his street, and it is not a case of copyright like *Maxwell* v. *Hogg* (1). It is, however, very like a case of trade-mark, though the Plaintiffs have not exclusive right to the name: *Croft* v. *Day* (2); but the Defendant has no right to try and deceive people. One of our ticket-holders has been actually deceived, and we then brought this action to stop it. He makes people believe that he is connected with us, as many tradesmen are; and in such a case the Court will interfere: *Cave* v. *Myers* (3); *Hookham* v. *Pottage* (4). In *Wotherspoon* v. *Currie* (5) it was held that, though the Defendant had a right to a name, he must not use it so as to deceive.

Higgins, Q.C., and *Romer*, for the Defendant, were not called upon.

MALINS, V.C., after stating the facts and expressing his regret that this Association, carrying on an enormous business, should

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the title of his shop the words in large letters "*New Carriage Bazaar*," and in his advertisements had used the same title with the addition "Opposite Madame *Tussaud's*."

The Plaintiffs moved for an injunction. Evidence was adduced of mistakes and confusion between the establishment of the Plaintiffs and that of the Defendants from the adoption of this title "*Carriage Bazaar*."

Druce, Q.C., and *Marten*, for the Plaintiffs, contended that the term "*The Carriage Bazaar*" had been sufficiently appropriated by the Plaintiffs in reference to their business in *Baker Street* for the Court to restrain its use by any other person setting up the same business in *Baker Street*.

Kay, Q.C., and *H. Fawcett*, for the Defendant, contended that he had as much right as the Plaintiffs to call his warehouse a bazaar, which was a title in ordinary use and could not be exclusively claimed by Plaintiffs.

GIFFARD, V.C., said that the principle in these cases was not that the Plaintiff had any property in the particular title, but that he had a right to prevent others from personating his business by using any such description as would lead customers to suppose they were trading with the Plaintiffs. The Defendant had failed to satisfy the Court that he had any other motive in what he had done than that of seeking to gain an unfair advantage over the Plaintiffs. Why did he change the title "*Carriage Repository*" into "*Carriage Bazaar?*" The Plaintiffs had established their case, and there must be an injunction.

Solicitors: *Dod & Longstaffe; G. F. Cooke.*

(1) Law Rep. 2 Ch. 307.
(2) 7 Beav. 84.
(3) 1 Set. Dec. 4th Ed. p. 238.
(4) Law Rep. 8 Ch. 91.
(5) Ibid. 5 H. L. 508.

have come to the Court upon a case so trivial and unimportant, continued:—

It is clear that the Association had no exclusive right to the use of the words "*Civil Service*," nor were they at the time selling boots and shoes, but it was said that they were going to sell boots and shoes, and going to open this establishment in *Bedford Street*. Now I agree with everything that has been said in the cases cited, that, in the conduct of trade one man must not make such representations as to lead the public to believe that he is selling another man's goods, or that they are buying another man's goods while they are in point of fact buying his. Therefore, Mr. *Dean*, like every other tradesman, is bound by this, that he must not make representations which will lead the public to go into his shop under the belief that they are going there to buy the goods of the Association. But when it turns out that down to the month of December, 1877, they had never sold boots or shoes at all, what impropriety could there be (there being no exclusive property in the words "*Civil Service*") in Mr. *Dean* putting in his window that he sold to the Civil Service and supplied the Civil Service with boots and shoes. That is, in my opinion, the meaning of the words "*Civil Service Boot Supply*—discount allowed"—they mean "I supply the Civil Service with boots and I allow them a discount."

But was he entitled to make the representation at that time? Did he come into competition with the Plaintiffs? It is admitted that, at that time, they did not sell boots and shoes anywhere. If they were not selling boots and shoes at that time he could not come into competition with their trade when he sold nothing but boots and shoes. How then was this calculated to mislead? Even if instead of in January or February, 1877, he began the use of these words in January or February, 1878, how would he have come into competition with the Plaintiffs? They at that time sold boots and shoes not nearer than *Tavistock Street*, and could any person going into a shop in the *Strand* suppose that he was going to the shop in *Bedford Street* or in *Tavistock Street?* These persons are ticket-holders, and must receive circulars, and the circulars and tickets they receive will tell them that the

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place to which they must go for their boots and shoes is in *Tavistock Street*, and not in *Bedford Street* or the *Strand*.

This is not like many of the cases which have been cited. The decision in *Lee* v. *Haley* (1) did not depend upon the use of the words "*Guinea Coal Company*." I find in my judgment, which was affirmed by Lord Justice *Giffard*, that I said they were entitled to call themselves the *Guinea Coal Company* if they sold coals at one guinea a ton, and that they might have called themselves so in any other place than *Pall Mall;* but the fraud consisted in setting up in *Pall Mall* and deluding persons who went into *Pall Mall* to buy coals from the other company. But when the words "Civil Service" are used, as every member of the public is entitled to use them, in one street, and in such a manner that it cannot lead the public to believe that they are going to the Defendant's shop to buy the Plaintiffs' boots, what offence has he committed? The thing itself is not calculated to deceive and does not deceive. No rational person desiring to go into the *Tavistock Street* shop could have been misled when he went into a shop opening into the *Strand* and having no other entrance. These rules of trade are made for the general public and for rational persons, and not for those who are willing to be misled and to believe that when they go into one street they are going into another. Therefore, if Mrs. *Cellier* was deceived it was her own fault. It is impossible, if she was a reasonable woman, that she should have believed she was going to the Plaintiffs' shop to buy boots and shoes in *Tavistock Street* when she went to an ordinary shop in the *Strand*.

Now, Mr. *Rogers* argued that, although the Association had no place where they sold boots and shoes when these words were put in the window, there was an intimation that they were going to do so. I drew his attention to the rule laid down in *Maxwell* v. *Hogg* (2), that the intention to issue a publication confers no property. So, too, in this case, an intimation by the Association that they intended to open a shop for a particular purpose can give them no right to restrain anything which any other person may think fit to do. This Defendant was perfectly at liberty, in

(1) Law Rep. 5 Ch. 155. (2) Law Rep. 2 Ch. 307.

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the month of January or February, 1877, to put these words in the window of his shop; because, even if they had been the same words as those used by the Plaintiffs, they having no exclusive right to use the words, and he being in the *Strand* when their place was intended to be in *Tavistock Street*, the words were not calculated to deceive and could only deceive those who were almost willingly stupid upon the subject.

In the present case, therefore, I am of opinion that the Plaintiffs have no merits whatever, and I dismiss the action with costs.

Solicitors for Plaintiffs: *Tathams & Pym.*
Solicitor for Defendant: *J. C. Button & Co.*

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Jan. 28.

BUBB *v.* PADWICK.

[1878 B. 171.]

Will—Vesting of Legacy—Payment—Discretion of Trustees.

Where a legacy is absolutely vested it cannot be divested by a subsequent gift over in the event of the legatee dying before he has received the legacy.

A testator gave his residuary estate in trust for all his children who should attain the age of twenty-one years, as tenants in common, but so that they should not be entitled to receive their respective shares until the youngest child attained the age of twenty-one years, unless the trustees of the will should in their discretion consider it proper that the shares, or any of them, should be paid: and the testator directed that in case any child should die before the youngest attained the age of twenty-one years and without having actually received his share, then that share should go over to the other children:—

Held, that each child on attaining the age of twenty-one years acquired an indefeasibly vested interest in his share.

In re Arrowsmith's Trusts (1) observed upon, and *Johnson* v. *Crook* (2) not followed.

GEORGE BUBB, by his will, gave his residuary estate to trustees on trusts for conversion, and directed them to stand possessed of the same, upon trust "For all my children (other than my said two sons *Thomas Henry* and *George Arthur*) who

(1) 2 D. F. & J. 474. (2) 12 Ch. D. 639.

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being sons or a son shall attain the age of twenty-one, or being daughters or a daughter shall attain that age or previously marry, equally among them as tenants in common, but nevertheless that my children so attaining vested interests shall not be entitled to receive their respective shares until my youngest child for the time being shall have attained the age of twenty-one years, unless my trustees or trustee shall in their, his, or her absolute and uncontrolled discretion consider it proper or expedient that their or any of their shares shall be paid to them earlier, in which case I empower my trustees or trustee to pay all or any part of the share of a child attaining a vested interest to such child at any time after he or she shall have attained such vested interest. And I further direct that until the shares of my said children respectively (other than my said two sons) shall be actually paid to them pursuant to the trusts aforesaid the annual income of each child's share, whether vested or presumptive, or so much of such annual income as my trustees or trustee shall deem expedient, shall be paid unto or applied for the maintenance and education of each such child." And the testator, after providing for raising any part of the presumptive share of any child, went on to say: "And I further direct that in case any child or children of mine (other than my said two sons) shall depart this life before my youngest child for the time being shall have attained twenty-one, and without having actually received the whole of his or her share, then so much of the share or shares as well original as accruing of the child or children so dying as shall not have been received by him, her, or them, shall go over and be divided equally among the other children of mine (other than my said two sons) who shall be living at the time when my youngest child for the time being attains twenty-one, and who being sons or a son shall live to attain twenty-one, or being daughters or a daughter shall attain that age or marry."

The testator died in April, 1879, leaving (besides his two above-mentioned sons) seven children, of whom three had attained the age of twenty-one years and four were infants. The trustees had not exercised the discretion reposed in them as to payment of the shares; and a special case was stated for the opinion of the Court, Whether those children of the testator who attain the age of

twenty-one years, or being daughters marry under that age, thereupon acquire under the said will an indefeasibly vested interest in the testator's residuary estate; or is such absolute vesting postponed until the testator's youngest child for the time being attains the age of twenty-one years?

Bristowe, Q.C., and *L. E. Pyke*, for the children who had not attained the age of twenty-one years:—

The second clause clearly makes the vesting depend upon the discretion of the trustees. This may be capricious, but testators often are capricious, and their wills are nevertheless to be followed. *In re Arrowsmith's Trusts* (1) and *Johnson* v. *Crook* (2) are clear authorities against vesting until payment where such are the directions in the will. *Collison* v. *Barber* (3) has very little to do with it. *Minors* v. *Battison* (4), *Martin* v. *Martin* (5), and *Hallifax* v. *Wilson* (6), were different.

Higgins, Q.C., and *Tremlett*, for the children who had attained the age of twenty-one years, were not called upon.

J. Pearson, Q.C., and *Maddison*, for the trustees.

MALINS, V.C., read the first above-stated clause in the will, and observed that if the will had stopped there it would not have been disputed, and it was not disputed, that each child would have had an absolute vested interest; the direction that they should not be paid until the youngest child attained the age of twenty-one years would be inoperative, and each child would be entitled to receive his or her share upon attaining the prescribed age, or upon the marriage of the daughters. His Lordship then read the last or divesting clause, and continued:—

If this had been a gift over of the whole share of each child upon dying before the youngest child attains its majority, it would have been perfectly good. The original clause being a vesting clause, this would have been a divesting clause as clearly as the original was a vesting clause, and the share must have gone

(1) 2 D. F. & J. 474.
(2) 12 Ch. D. 639.
(3) Ibid. 834.
(4) 1 App. Cas. 428.
(5) Law Rep. 2 Eq. 404.
(6) 16 Ves. 168.

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over if any of the children died before the youngest attained his majority. But it is not an absolute gift over; it is only in the event of their dying without having received their shares. And when are they to receive their shares? They are clearly entitled to receive their shares immediately upon the death of the testator, or as soon afterwards as they attain the age of twenty-one years; for the rule of this Court has always been that legatees are entitled to receive their shares when the shares become vested. This principle has been acted upon for ninety years—certainly from the time of the decision of *Hutcheon* v. *Mannington* (1)—that where there is a gift of property, with a gift over if the legatee dies without receiving it, that gift over is too vague and indefinite; it is simply regarded as void, and the original gift remains.

There is another, and, to my mind, most conclusive, reason why it should not be acted upon in any case, which is, that then the gift is to go over upon the mere accidental circumstance of the legatee not having received the share. It may be that the legatee is abroad and does not know of the death of the testator, and from that circumstance is prevented from receiving his legacy. It would be a grievous hardship that his share should go over because he was accidentally absent and could not receive that which the trustee would be willing to pay him if he were present. Instead of depending upon the will of the testator, the legacy would depend upon the conduct or the will of other persons. It would be possible for the trustee—the legatee being in a precarious state of health, and the legatee's family being desirous of having the legacy—pertinaciously to withhold the legacy; and thus, if the legatee died, the legacy would go over, not by the will of the testator, but by the capricious act of the executor or trustee refusing to pay. The same thing might happen if the trustee cannot get the assets in; and in that case also, although the right to receive the legacy had arisen, the legatee would not receive it. That result would be most irrational, and contrary to the decisions for the last ninety years.

In the case of *Clark* v. *Henry* (2) I had to consider the point; and on referring to my judgment, which was affirmed by the Court of Appeal (3), I find that I went into the reason of

(1) 1 Ves. 366. (2) Law Rep. 11 Eq. 222.
(3) Law Rep. 6 Ch. 588.

the thing on that occasion, as I do now. There is the case of *Hutcheon* v. *Mannington* (1), which I consider the great leading case upon the subject, and there is also the case of *Hallifax* v. *Wilson* (2), a decision of Sir *William Grant*. Nothing can shew the strength of the rule better than that case; the testator there gave his property (there was a tenancy for life) upon trust to pay the nephew and nieces on attaining twenty-one. Directly the nephew and nieces attained twenty-one the trust would arise in their favour, and the gift was absolute. But he directed that in case any of his said nephew and nieces should happen to die before his or their share or shares respectively of, in, and to the said trust moneys and trust premises should become payable, the share or shares should go over. This is a remarkably strong case, because the shares could not be payable until the death of the tenant for life. One of the legatees died in the lifetime of the tenant for life, having attained the age of vesting, and how was it dealt with by Sir *William Grant?* He held that there was a vested interest at the age of twenty-one, before the death of the tenant for life. Therefore, the legatee dying before the death of the tenant for life, his share did not go over. *In re Yates's Trusts* (3), which is the next case in order, is always impressed upon my mind as very important. It was very elaborately argued by Mr. *Russell* and Mr. *Milne* on one side, and by myself and Mr. *Collins* on the other. It proceeds precisely upon the same principle. It was this: a testator gave £25,000 to trustees upon trust to pay the income to his daughter for life, and after her death to pay the capital to the children of his daughter equally on their attaining their ages of twenty-one years; the interest of their shares until their becoming entitled to the principal to be applied for their maintenance; and in case any of the children should die before being entitled in possession to his, her, or their shares, the shares of those so dying should go to the survivors. The testator's daughter had two children living at his death, who both attained twenty-one, one of whom died in the lifetime of the mother, and it was held that the representatives of the deceased child were entitled to a moiety of the fund. Why? Because

(1) 1 Ves. 366. (2) 16 Ves. 168.
(3) 21 L. J. (Ch.) 281; 16 Jur. 78.

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although "being entitled in possession to his, her, or their share," could not take effect until the tenant for life died, yet upon the broad rule of the English law, which vests property as early as possible, the Vice-Chancellor *Parker* considered that they were entitled to possession of their property at the period of vesting, that is, at twenty-one years of age. Therefore, upon those grounds he held that the property did not go over.

Now, there is a decision of Sir *W. P. Wood*, *Martin* v. *Martin* (1), precisely to the same effect, and a decision of the House of Lords in *Minors* v. *Battison* (2) in every respect precisely the same, namely, that the mere accidental delay in converting the property—which was there a newspaper—was not to postpone the vesting of the shares, although the gift over was if the children died without having received their shares. Why did they not receive their shares? Not because they were not willing to receive them, but because the state of the testator's assets did not enable the trustees to pay them. That is a forcible illustration of what I said, that if the directions as to children dying without receiving their shares were to have effect given to them, it would not be the will of the testator, but accidental circumstances—either the conduct of the trustees and executors, or the state of the assets of the testator, or the legatee being abroad—which would determine whether the property should or should not go over.

There is another case that I must mention, *In re Arrowsmith's Trusts* (3), and I am bound to say that, although affirmed in the Court of Appeal, I do not think it sufficiently adheres to the rule of vesting property at the earliest moment. In *In re Arrowsmith's Trusts* the trust was absolute; but there was a gift over if the legatee should die without receiving his share. The legatee did die within a year from the death of the testator. Vice-Chancellor *Kindersley* (4) held that the legatee was not entitled to receive the legacy until the expiration of a year; and, as he died within a year, that gift over took effect. He overlooked this very material circumstance, that it is not necessary for the executor to delay payment of the legacy; if he is satisfied that the assets are

(1) Law Rep. 2 Eq. 404.
(2) 1 App. Cas. 428.
(3) 2 D. F. & J. 474.
(4) 6 Jur. (N.S.) 1231.

sufficient to pay the legacy and that there are no debts, the legatee has a right to payment immediately after the death of the testator. The sensible rule of law is, that the period of vesting is the period of payment, and when the legacies vest, they are considered as payable. That has not infringed any general rule, and I should have thought that the state of the authorities would have been conclusive; but it is said that the Master of the Rolls, in a very elaborate judgment in *Johnson* v. *Crook* (1), has come to an opposite conclusion. I have heard the judgment read at very great length, but it is very unfortunate that there do not seem to have been cited to him, or he did not deem it right to consider, two very leading cases, *Hallifax* v. *Wilson* (2) and *In re Yates's Trusts* (3). I adhere to the old rule for the reason I have stated; and I am clearly of opinion that where a legacy has absolutely vested, it cannot be divested by a clause which says that it is to go over if the legatee dies before receiving it. I am, therefore, obliged to come to an opposite conclusion to that of the Master of the Rolls. He is a Judge of co-ordinate jurisdiction, and most of his decisions I follow cheerfully; but in this case I lament that he came to this conclusion without those cases being cited to him. I entirely dissent from his judgment, and I entertain a totally different opinion. That being the case, the Master of the Rolls being a co-ordinate Judge, I am at liberty to act upon my own opinion, though I should not have done so if I were not following a long line of authorities.

My opinion is, that the children take absolute vested interests, and are entitled to insist upon payment as they respectively, being sons, attain the age of twenty-one years, or, being daughters, as they attain that age or marry.

Solicitors: *Eardley Holt & Richardson; Pyke & Minchin.*

(1) 12 Ch. D. 639. (2) 16 Ves. 168.
(3) 21 L. J. (Ch.) 281; 16 Jur. 78.

V.-C. M.

1879

Nov. 25, 26, 28, 29; *Dec.* 1.

ALLEN *v.* RICHARDSON.

[1877 A. 163.]

Vendor and Purchaser—Mutual Mistake—Completion of Contract—"Caveat Emptor."

5 CPD 388, 9 QBD 266, 12 QBD 37

Plaintiff sold by auction a term of fifty years in a public-house at a rent of £105, and subject to a covenant against Sunday trading. It was stated at the sale that the freeholder had offered to release the covenant on having £25 additional rent. Defendant was the purchaser, and after the sale received an abstract which shewed that the vendor was an underlessee. After this the Plaintiff procured from the freeholder a release of the covenant, and the Defendant accepted a lease at a rent of £130 and paid the purchase-money partly by an order on his brewers. On the day after completion he became aware that the release from the freeholder was not effectual without a release from the original lessee, and stopped payment of the order on the brewers until this should be obtained. The required release could not be obtained, and the Defendant claimed to retain his bargain with compensation:—

Held, that compensation could not be given for an error discovered after completion.

In re Turner and Skelton (1) dissented from.

Held, also, that Plaintiff was entitled to specific performance of the original contract at the rent of £105, and without a release of the covenant.

ON the 5th of June, 1877, the lease of a public-house, called the *Royal Edward*, at *Hackney*, was put up for sale by auction. The house had been advertised previously, and was described as possessing the inestimable advantage of being closed on Sundays; but previously to the day of sale the Plaintiff, *Frederick Allen*, who held the lease, applied to the freeholder, Dr. *Dawson*, to whom he had always paid his rent, to give his consent to the house being open for Sunday trading, and on the 17th of May, 1877, Dr. *Dawson* wrote to the Plaintiff in these terms: "Dear Sir, I am prepared to cancel the clause in the lease and permit you to open the *Royal Edward* on Sundays, on the condition previously agreed upon, viz., that you pay twenty-five pounds additional rent."

One of the conditions of sale, after specifying the amount of deposit to be paid, provided as follows:—"That on payment of

(1) *Ante*, p. 130.

the remainder of the purchase-money a lease will be granted by the vendor to the purchaser for the term of fifty years from Midsummer, 1877, at the yearly rent of £105, but the purchaser shall not be entitled to investigate or call for the production of the vendor's title or his right to grant such lease, except upon the purchaser's paying all the expenses of so doing. The draft of the lease to be granted to the purchaser (and which he will be required to accept without any alteration or addition), and the lease under which the vendor holds, may be perused at the office of the vendor's solicitors seven days previous to the day of sale, and will be produced on the day of sale."

It appeared that Dr. *Dawson*, the freeholder, had granted a lease of this public-house on the 1st of March, 1859, to *Edwards & Bristo*, who, on the 2nd of June, 1870, had granted an underlease of the remainder of the term vested in them (being sixty-eight years and three-quarters of a year) less one day, to the Plaintiff *Allen*, at a rent of £100.

Both these leases contained a covenant that the lessee would not open the public-house for trade on Sundays, and in the event of a breach of this covenant, such breach was to operate as a forfeiture. The draft of the lease prepared for the acceptance of the purchaser, and which he was required to take under the conditions of sale, also contained the restrictive covenant against Sunday trading, and the rent reserved to the vendor was £105 a year.

At the time of the auction, the auctioneer, *Peter Belton*, produced the lease to be granted to the purchaser, and read portions of it, including the covenant that the lessee would not open the house on Sundays; but he stated further, that a letter had been received from Dr. *Dawson* on the subject of Sunday trading, which had been stamped as an agreement, and this letter he read out in the auction-room, and stated that it would be handed to the purchaser.

At this sale, the Defendant *Richardson* became the purchaser for the sum of £7600, and he thereupon paid a deposit of £760. The abstract of the vendor's title, consisting only of the underlease to the Plaintiff from *Edwards & Bristo*, was delivered on the 9th of July to the purchaser's solicitor, and on the back of

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that underlease was indorsed a release by Dr. *Dawson* of the restrictive covenant against Sunday trading in consideration of an increased rental of £25 per annum, which *Allen* agreed to pay.

The parties met together on the 19th of July, and the lease was then executed, and the purchase-money, amounting, with an additional sum for fixtures, to between £8000 and £9000, was then paid by *Richardson*. The lease as it then stood contained no covenant to prohibit Sunday trading, and the rent reserved was £130. Part of the balance of the purchase-money was paid by the Defendant by means of a cheque or voucher drawn by a clerk of Messrs. *Barclay & Perkins* (the brewers) on the firm for £3300, in exchange for which they would give their cheque.

On the 20th of July, being the day following that on which the purchase was completed, the Defendant's solicitors discovered that the release of the covenant by Dr. *Dawson*, the freeholder, would be of no avail without the consent of *Edwards & Bristo*, in whom was reserved the one day of their original lease, and the course pursued by the Defendant was immediately to stop payment of the cheque by *Barclay & Perkins*, and a correspondence ensued between the Plaintiff and Defendant in which the mistake which had arisen was recognised, and the Plaintiff, on the 3rd of October, wrote to the Defendant offering to refund the purchase-money and rescind the purchase. This letter was not answered by the Defendant, who continued in possession of the premises down to the time of the commencement of the action, which was on the 18th of October, 1877.

The statement of claim alleged that the Plaintiff was not able to get in the outstanding day, or to obtain the concurrence of *Edwards & Bristo* in releasing the restrictive convenant, but he insisted that the release of the covenant formed no part of the contract, and that the Plaintiff was not bound to obtain such release. The Plaintiff also alleged that the lease granted by him to the Defendant did not under the circumstances duly carry out the contract for sale, and offered, on payment by the Defendant of the residue of the purchase-money and on delivery up of the said lease, to execute a proper lease in accordance with the contract, and the Plaintiff claimed, 1. Payment of the £3300, residue of the purchase-money; 2. If and so far as necessary specific

performance of the agreement of the 5th of June, 1877, in accordance with the conditions of sale, the Plaintiff offering to grant such underlease; 3. An injunction restraining the Defendant from opening the premises for Sunday trading without the license of the immediate lessors of the Plaintiff; 4. Damages.

The Defendant by his statement of defence and counter-claim alleged that both before and after the sale by auction he was informed by the Plaintiff's agents that the letter from Dr. *Dawson* would enable the purchaser, upon payment of an additional rent of £25, to open the premises on Sundays, and that the auctioneer represented at the time of the sale that the letter of Dr. *Dawson*, as the freeholder of the property, was sufficient for that purpose, and that but for the representation made at the sale that the purchaser would acquire the right of Sunday trading he would not have bid for the property. The Defendant alleged that the Plaintiff had in fact undertaken to procure a valid release of the covenant, and he claimed that the Plaintiff ought to be decreed specifically to perform this undertaking, and if it was impossible to procure the release, then the Defendant ought to have an abatement of the purchase-money; and he further claimed an inquiry as to the amount of damages he had sustained by reason of the Plaintiff's failure to obtain such release of the covenant.

When the action came on for hearing witnesses were examined on both sides.

The evidence on behalf of the Plaintiff was to the effect that prior to the sale the Defendant called at the office of the solicitor and inspected the lease, which was to be given to the purchaser, and which contained the covenant against Sunday trading; that he inquired whether this covenant would be enforced, and was told that the house would be sold as a six-days' house, but that a letter had been received from the freeholder, Dr. *Dawson*, agreeing to release the Plaintiff *Allen* from the covenant against Sunday trading; that at the auction the letter of Dr. *Dawson* was read, and it was stated that the said letter would be handed to the purchaser for what it was worth, but no statement was made, and no undertaking was given by or on behalf of the Plaintiff, that Dr. *Dawson* had power to give the release of the covenant, or that an effectual

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release would be procured, and that the house was sold as a six-days' house without any power of Sunday trading. This conversation was denied by the Defendant.

Evidence was also given on behalf of the Defendant that his agent was told by the auctioneer that the house might be opened on a Sunday upon payment of an extra rent of £25, and that in all probability there would be an increase of the profits to the amount of £20 per week, which would make a clear extra value of £1000; that as a matter of fact the house was licensed as a seven-days' house; and that at the auction, before the business commenced, the auctioneer, upon being asked the question, answered that the letter of Dr. *Dawson* would give the purchaser the option of opening on Sundays, and that if it had not been for this answer the Defendant would not have bid at all for the house. The auctioneer denied this, and described his statement at the auction as being to the effect hereinbefore stated with reference to the conversation between the Defendant and the Plaintiff's solicitor.

J. Pearson, Q.C., *Talfourd Salter*, Q.C., and *Hull*, for the Plaintiff:—

The property which was put up for sale was a public-house which was restricted from Sunday trading. The Plaintiff had nothing else to sell. Nothing else was sold, and the purchaser bought nothing but that. No doubt the purchaser was desirous of being able to trade for seven days instead of six, and the vendor was desirous that the restriction should be taken off, because he expected that a better price might be obtained for the property. For that purpose he obtained Dr. *Dawson's* letter. Dr. *Dawson* was the person to whom Mr. *Allen* had always paid his rent, and he naturally thought that his sanction would be sufficient, but he gave no undertaking whatever upon the subject. The property had been advertised for several weeks as a house with the inestimable advantage of being closed on Sunday, which shewed clearly that by many persons this restriction would be thought a great advantage; but at the auction the letter from Dr. *Dawson* was read, and the auctioneer stated that it would be handed to the purchaser for what it was worth. The evidence as to his having said more than this cannot be trusted, since it was impossible for

the auctioneer at that stage of the transaction to say more. No doubt the vendor believed he had done all that was necessary to secure the release of the covenant, but he gave no undertaking to do so, and it was the duty of the purchaser and his legal advisers to investigate the title and to see that they obtained what they believed they had contracted for. Then, after the auction what took place? The abstract of title was furnished in the usual course, and this consisted of the lease from *Edwards & Bristo* for the whole term granted to them wanting one day. Surely this was sufficient to intimate to the purchaser's advisers that some inquiry should be made respecting the intermediate interest. The obvious course was to obtain a release of that one day, or to discover the reason why it was refused. But no further inquiries were made. A formal release of the covenant was obtained from Dr. *Dawson;* the rent was increased in consideration of that release, and the whole transaction was concluded by the execution of the conveyance and payment of the purchase-money. There was no excuse for stopping the payment of the cheque, and it might have caused the most serious injury to the vendor. But after this the conduct of the purchaser was inexcusable, for the utmost he could have expected in case of a mutual mistake was the cancellation of the whole transaction, and although this was offered to him by the vendor no notice was taken of the offer. Under these circumstances the authorities are clear that such a transaction cannot be set aside. The cases of *Legge* v. *Croker* (1), *Wilde* v. *Gibson* (2), and many others were cited to your Lordship in the case of *Manson* v. *Thacker* (3) and in *Besley* v. *Besley* (4), when you decided, after reviewing all the authorities, that a purchaser cannot in the absence of fraud obtain any compensation after completion of the contract by the execution of the conveyance.

In both those cases the defect was discovered after the completion of the contract. You thought the purchaser had the means of finding out the defect before completion. So, here the purchaser had the means of knowledge, for he had notice of the outstanding interest, but it was not discovered that *Dawson* had no power to release the covenant till after completion.

(1) 1 Ball. & B. 506.
(2) 1 H. L. C. 605.
(3) 7 Ch. D. 620.
(4) 9 Ch. D. 103.

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Glasse, Q.C., *Higgins*, Q.C., and *Whitehorne*, for the Defendant:—

Throughout the whole of the transactions leading up to the contract the Defendant was deceived, and was led to believe that the release of the covenant by Dr. *Dawson* was all that he could require. There is evidence to shew that he expressed great anxiety as to Sunday trading, and it was in the full belief that he was purchasing a trade without the restriction, that he bid up to the amount offered. He was shewn the letter of *Dawson* by way of proof, and to make it more deceptive the letter was stamped as an agreement. Without imputing wilful deception to the vendor, it is quite certain that the purchaser was deceived, and it is also certain that the vendor had the means in his possession of knowing the truth long before the sale, which the purchaser had not. On the contrary, one of the conditions of sale was that the purchaser should not be entitled to investigate or call for the production of the vendor's title, or his right to grant the lease, except upon paying all the expenses of so doing. The Plaintiff, before he sold the property, was bound to ascertain what title he had, and by obtaining the promise from Dr. *Dawson* to release the covenant, it was the same thing as stating positively that *Dawson's* release was the only release required. We, therefore, bought with notice that *Dawson* was the immediate freeholder. By this misstatement the vendor has obtained one-seventh more for his property than he would have had for a six-days' trade, and that sum is the amount of damages which ought to be repaid. The very lease which was prepared for us to accept is at a rent of £25 higher, on account of our having the advantage of Sunday trading, in addition to the £5 profit rental which *Allen* himself gets. The terms of the contract have been varied by the vendor himself, and we ask, by our counter-claim, for specific performance of that contract so varied, and our having entered does not preclude us from that relief. The vendor cannot impute negligence to us in not discovering what he himself had neglected to ascertain, and it is his duty now to perfect the contract by obtaining the release of *Edwards & Bristo's* interest, or to give us compensation. It is easy to say that we did not accept the offer to cancel the contract, but we have expended large sums in improvements, and no offer was made to repay this outlay, and a

man who has given up his former occupations and has settled into a new undertaking would have great difficulty in throwing up the contract and upsetting all his arrangements.

The case of *Manson* v. *Thacker* (1) no doubt stands in the way of our contention, but there the mistake or misrepresentation was very different. The question of the hidden culvert was not suggested by either party, and the vendor did not say a word about it that could have misled the purchaser. The property was no doubt described as available as a building site for a warehouse or granary, but so it was available, though not to the whole extent required by the purchaser, and the vendor was not bound to disclose the fact, about which he was not asked. The case of *Manson* v. *Thacker* was cited in a recent case before the Master of the Rolls, *In re Turner and Skelton* (2), and his Lordship did not take the same view of the previous authorities. There the question was whether the purchaser was entitled to compensation (under a clause in the conditions of sale that any error or misstatement should not annul the sale) in respect of an admitted error in the quantity of land comprised in the sale. The conveyance had been executed, and yet it was declared that he was entitled to compensation. *Harnett* v. *Baker* (3) very much resembles this case, where one of the conditions of sale was founded on an erroneous statement of fact—a statement which the vendor was bound to know was erroneous—and your Lordship decided that it could not be enforced on a purchaser. Then in *Jones* v. *Clifford* (4) there was a common mistake without any fraud, and Vice-Chancellor *Hall* held that specific performance could not be decreed. There the Vice-Chancellor, in referring to *Cooper* v. *Phibbs* (5), said: "Nothing can be clearer than this, that Lord *Cranworth* recognised the principle that the Court would, even in the case of a completed contract, give relief against a common mistake in the same way as it would against fraud."

In *Cann* v. *Cann* (6), the Vice-Chancellor said: "The question is whether, there having been a misrepresentation as to the value of the property, in respect of which the purchaser had a

(1) 7 Ch. D. 620.
(2) *Ante*, p 130.
(3) Law Rep. 20 Eq. 50.
(4) 3 Ch. D. 779, 792.
(5) Law Rep. 2 H. L. 149.
(6) 3 Sim. 447, 449.

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right of action, the circumstance of his having taken a conveyance has destroyed that right. Now it appears to me that the right of the petitioner in that respect, is not at all affected by that circumstance." That is an authority that the purchaser's right is not taken away by the conveyance having been executed. In *Bos* v. *Helsham* (1), it was held that an error in the particulars of sale as to the rental of the property was a proper subject of compensation, although not discovered until after the execution of the conveyance. And in *M'Culloch* v. *Gregory* (2), it was held that a purchaser was entitled to rescind the contract in consequence of an error in the abstract, notwithstanding that it was owing to the negligence of the purchaser that the error was not discovered.

We therefore submit that we are entitled to compensation on these grounds—that there was a statement made by the vendor which was untrue—that that was a material statement, and was relied upon by us and was acted upon by both parties, and that we took possession on the footing of the lease, under which we agreed to pay an increased rental for the advantage of a Sunday trade which was given us by the lease.

[They also referred to *Thomas* v. *Powell* (3), *In re Banister* (4), and to *Dart's* Vendors and Purchasers (5).]

J. Pearson, in reply, referred to *Malins* v. *Freeman* (6), to shew that the utmost the purchaser could be entitled to was a rescission of the contract, which had been offered and refused. He referred also to *Swaisland* v. *Dearsley* (7), *Legge* v. *Croker* (8), *Hart* v. *Swaine* (9), and *Okill* v. *Whittaker* (10).

MALINS, V.C.:—

This case is certainly a remarkable illustration of the extreme difficulty which may be thrown upon parties by a slight error in the transaction of business: having given very great attention to the case, and having read every authority which has been

(1) Law Rep. 2 Ex. 72.
(2) 1 K. & J. 286; 24 L. J. 246.
(3) 2 Cox, 394.
(4) 12 Ch. D. 131.
(5) 5th Ed. p. 777.
(6) 2 Keen, 25.
(7) 29 Beav. 430.
(8) 2 Ball & B. 506.
(9) 7 Ch. D. 42.
(10) 2 Ph. 338.

mentioned, and having referred again to my own notes in order to ascertain what the facts of the case are, I come to the conclusion which I am about to state without any serious difficulty. I may say at once that I regard the vendor and purchaser as impressed with a desire to act fairly towards each other: I regard their agents as desiring to carry this contract effectually into execution in a fair and honourable manner.

The difficulty has arisen in this way: In the year 1870 the Plaintiff took a lease of the public-house in question, the *Royal Edward*, for the term of years for which it was held by Messrs. *Edwards & Bristo*, from 1859 less one day, which was reserved to *Edwards & Bristo*. This lease, as the original lease did, contained a covenant restricting the house from being open on Sundays. The Plaintiff *Allen*, in the month of April, 1877, instructed Messrs. *Belton*, auctioneers, to take the necessary steps for selling the house. It appears that, as to the legal part of the business, Messrs. *Belton* were referred by *Allen* himself to Messrs. *Brown*, who were his solicitors. To Messrs. *Brown* of course would belong the duty of preparing the conditions of sale. The thing which was intended to be sold, the thing which they were instructed to sell, and the only thing which *Allen* had to sell in the month of April, 1877, was this lease, granted for the remainder of the term by *Edwards & Bristo* less one day, with the restriction that the house should not be opened on Sundays. *Allen* instructed the auctioneer to sell that thing only. It appears that, the house having been very successful with six days' trading, Mr. *Belton* was of opinion that it was a very great advantage if a man could buy a public-house carrying on a good and flourishing trade for six days by which he might at all events have one day, namely, the Sabbath, to himself, and that there were many persons among licensed victuallers who would prefer buying a house with such a restriction as that, to buying one where, there being no such restriction, they would be obliged to open it on Sundays. It seems, however, to have occurred to Mr. *Belton* or Mr. *Allen* that there were persons who would prefer to have the house open on all the days of the week, and Mr. *Allen*, without communicating with his solicitor or the auctioneer, writes to the gentleman to whom he pays his rent, and who therefore he was justified in supposing was

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the person whose consent was wanted, to ask on what terms he would give liberty to open the house on Sundays. In answer to that letter he received this letter, dated the 17th of May, 1877, from Dr. *Dawson*:—"Dear Sir, I am prepared to cancel the clause in the lease and permit you to open the *Royal Edward* on Sundays, on the condition previously agreed upon, viz., that you pay £25 additional rent." Now that is not a contract, it is an offer which threw no obligation on *Allen* to act upon it. It gave him the option, but nothing more, and if, in the result, he never applied to Dr. *Dawson* to extend this period, the thing would drop. But, however, as it might be treated as a contract by Dr. *Dawson*, it was thought prudent to get it stamped. Then the advertisement was issued. The whole of his conduct seems to me to shew that it was the intention of Mr. *Allen* from the beginning to the end to offer nothing more than the thing which he had, namely, a public-house which had the privilege of trading only six days in the week, and which could not trade on the seventh. In order to shew that this was the intention, what did they advertise for sale? From the beginning down to the 4th of June, which is the last day of the advertisement, the sale having taken place on the 5th of June, the house continues to be advertised on these terms. After giving certain particulars to which I need not refer, it contains these words: "The trade is entirely a counter one, and it has the inestimable advantage to many of being closed on Sundays." But there are many people in that line of business who would rather keep their houses open the whole of the week including Sundays. Mr. *Richardson* says he would not have bought the house unless he could have it open every day of the week. Now I have adverted already to the terms of the advertisement. What is there to shew that the intention was to sell more than a six-days' trading? The proposed lease, which the parties are invited by the particulars of sale to examine seven days before the sale, is for a term of fifty years, and the original rent to *Edwards & Bristo* being £100 a year, it is to be at a rent of £105 a year, so that Mr. *Allen* is to get an increase of £5 a year; in other respects the covenants of the lease are to be precisely the same as those contained in the original lease. Accordingly, in order that the parties might, in pursuance of the conditions of sale, see the very

terms in which they were to covenant, Messrs. *Brown* prepared a draft lease containing this very covenant, in fact using the same words, that this house was not to be opened for trading on Sundays. Now was there any mistake? Mr. *Richardson*, an intelligent man, went to Mr. *Brown's* office to inspect the lease. Mr. *Brown* and he both agree on the point, that the draft lease under which he was to hold the property, and under which he was to buy it, was put into his hands in order that he might not be taken by surprise by any want of knowledge on his part. He went into another room to read the lease and afterwards came back. Now I have the very distinct evidence of Mr. *Brown* as to the conversation which took place on that occasion. Mr. *Richardson* states that nothing was said on the subject; but that is very improbable; and considering the anxiety that he was under, according to his statement in the box, to have the Sunday trading, I can hardly suppose that his memory is accurate in saying that no conversation on the subject took place, and I have the positive statement of Mr. *Brown* to the contrary effect. That brings us to the day of the auction; and up to that time, I am not able to discover a single word that had been said, to let the purchaser, whoever he might be, suppose he was to get anything more than a lease of which he knew the terms. He was referred to Messrs. *Belton* to see what were the returns of the house, and he had every opportunity of seeing the returns and satisfying himself whether it was worth his while to buy. He goes to the auction and bids £7600 at a rent of £105 a year, besides which the stock is taken at a valuation, bringing up the whole of the money to a sum of between £8;000 and £9,000. Now we have many witnesses as to what took place in the auction room. It is agreed on both sides that *Belton* read the conditions of sale. He did not read all the covenants of the lease, but he certainly read the covenant restricting the Sunday trading; on that subject there is no contradiction. Why should those conditions be read? Upon what principle could he have read them out, if the intention was to sell the house with an absolute right to trade every day in the week? Then, after reading the lease, *Belton* went on to say, "I am offering you a public-house; we will give you an absolute right by the lease to trade six days in the week; that is the thing I am selling, but we have this letter from

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Dr. *Dawson*, and whoever becomes the purchaser we will hand it to him for what it is worth." Then he says that the biddings were very active, and as it was a very genuine property there were many bidders. If I were to accede to the application of the Defendant in this case, I should put the Plaintiff in the position of having lost the advantage of those biddings, which I never could restore to him. Then he says, "It is not true that I said whoever buys the house will be able to open it on Sunday." He is most positive on that subject, and his statement is confirmed by several witnesses. The matter goes on. The vendor was not, under the conditions of sale, to deliver an abstract unless required to do so, but a meeting took place between Mr. *Milner*, who conducted the business on the part of the purchaser, and Mr. *Brown*. On the 9th of July, Mr. *Milner* having asked for an abstract, the abstract was delivered to him; it is an abstract of the lease dated the 2nd of June, 1870, that is to say of the underlease which had been granted to Mr. *Allen*, the vendor. This distinctly on the face of it shews that it was an underlease reserving one day to Messrs. *Edwards & Bristo;* the reservation of that one day shews that they themselves were lessees, and it is also shewn by the fact that there is a covenant by them to produce the indenture of lease of the 1st of March, 1859. It is most material to observe that that abstract gives the purchaser distinct notice that he is purchasing an underlease, and also gives him notice of the fact that between the freehold and the vendor's interest, one day is reserved to Messrs. *Edwards & Bristo*. I should have mentioned that in the interval all the parties had assumed that Dr. *Dawson* was the freeholder, and a deed was prepared for the satisfaction of the purchaser, by which Dr. *Dawson* released the restriction against Sunday trading, and this was indorsed on the lease, and Mr. *Allen* agreed to pay him the additional rent of £25.

Now this was all deliberately done with this abstract in the possession of the purchaser, shewing him as distinctly as it could have shewn the vendor, that there was a reversion of one day reserved by Messrs. *Edwards & Bristo*. It ought to have presented itself to the mind of the purchaser's solicitor or counsel, whichever it was, that, in order to make the thing complete and confer an absolute right to open on Sunday, the concurrence of

these reversioners for one day ought to be obtained. That was overlooked on both sides. Certainly it was overlooked, I think, by Mr. *Richardson's* advisers, because they now complete the whole thing and pay the purchase-money. The cheque of Messrs. *Barclay & Perkins*, I think, ought to be considered as an actual payment, just as much as if it had been made by a bag of 3300 sovereigns; the purchase-money therefore was wholly paid.

Now I say that there is a rule between vendor and purchaser which cannot, in my opinion, be too rigidly adhered to. I have said so in other cases, and I adhere to it strictly now: and that is, that in all the transactions of life, whether it be a sale or a purchase, you must, if you are wise, be wise in time. Therefore, in the case of a vendor and purchaser, which necessarily involves the investigation of a title—an investigation whether the vendor can give the purchaser all that he has contracted to give, and upon which alone, being satisfied, the purchaser pays his purchase-money, if he is to be wise he must be wise in time, and he cannot be wise in time unless he objects before he completes the contract. But what information did this purchaser acquire after the 19th of July which was not in his possession before? He thought he had discovered something fresh, and accordingly he went to Messrs. *Barclay, Perkins, & Co.* to stop the payment of this cheque, and from that moment the vendor was out of possession of £3300, and has lost the interest on it since. I ask what information did the purchaser acquire after the 19th of July which he had not before? If he wished to know about this outstanding day, the abstract shewed him that. If he had laid the case before counsel, which he does not seem to have done, he would have been told, Here is a lease bearing upon this; here is a freeholder who is going to cancel this covenant with regard to the restricted trading on Sunday; an experienced conveyancer would at once have said that would not do, because there was the outstanding day in *Edwards & Bristo*, who must consent, otherwise it will not be effective. I have not heard a single scrap of information which the Defendant and his advisers acquired after the 19th of July which was not in their possession before. Now, therefore, what is the case? I have already stated the grounds on which I come to the conclusion that the only thing the vendor ever

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intended to sell, and the only thing therefore which the purchaser was entitled to consider himself purchasing, was the lease of the public-house for a term of fifty years with a restriction against trading on Sundays. He bought that and that alone. No doubt, if the covenant was to be cancelled, he was entitled to receive a letter which, as against the freeholder, enabled him to shew that the freeholder dispensed with that restriction. Now, whose duty was it to see that this letter could be used? Was the vendor bound to do so? I am clearly of opinion that it was not his duty to do so. The rule *caveat emptor* applies to this as to every other case. If the purchaser was so anxious on the subject of Sunday trading, it was his duty to investigate the title and ascertain that the man who said he would dispense with a certain condition could effectually do so, because it might turn out that although *Allen* had always paid his rent to Dr. *Dawson*, who had always received it, which was *primâ facie* evidence of his being seised in fee, yet he might be merely a tenant for life who could not dispense with that condition; he might have been himself the lessee, so that if there was any doubt on this it was incumbent on the purchaser and not on the vendor to look into it; that is to say, if he wanted to have a useful release of the restriction as to trading on Sundays, it was his duty to investigate that fact before completion. In my opinion he became wise too late when he made a discovery of this kind after he had completed his purchase, and the vendor in giving this conveyance has given all that he ever contracted to give. Under those circumstances what ought the Defendant to have done? That the cheque ought to have been paid is clear to my mind; there was no justification, in my opinion, for withholding the payment; and the purchaser did the vendor a great wrong by stopping the payment. If there was a mistake he had another remedy; if he bought a property—there being evidently no fraud, for that is not charged or suggested, but a mere mistake, and that being a mistake equally of the vendor and purchaser—his proper remedy would have been to rescind the contract. But that he does not do, he takes the law into his own hands and deprives the vendor of his purchase-money. It might have been very serious for the vendor to be kept out of £3300; it is a very serious thing for a man to be

kept out of so large a sum of money when he has made his arrangements to receive it on a particular day. If the discovery had been made before the 19th of July that a fatal mistake had occurred, that might have been a ground for letting the purchaser off the contract. If the Defendant, instead of completing the purchase on the 19th of July, had in consequence of the mistake then refused to complete, it is very possible the Court would not have enforced the contract, seeing that there had been this oversight on both sides, but the Defendant had elected to complete the purchase; it was the duty of the purchaser, as I have stated, the means being in his own possession, to find out the mistake before the completion of the purchase; and after the parties separated on the 19th of July it was, in my opinion, too late to do so.

I have stated the rule very broadly. I cannot state it more distinctly than I have stated it, namely, that it is absolutely necessary (and the interests of society are greatly involved in this question) that when a man sells a property it should be the duty of the purchaser to investigate the title, and he must do so and satisfy himself before completion. If there is a discovery of what we call in the ordinary sense a defect of title, say, for instance, because the vendor has not the property which he professes to be able to sell, or that he is merely tenant for life instead of being tenant in fee, or a defect in the statement of the quality or the quantity of the estate, it is the purchaser's duty to ascertain that before he completes his purchase. This is beyond all doubt upon the authorities. I have gone into it in two cases, one of which was the case of *Manson* v. *Thacker* (1) (and I adhere to my decision in that case), and also in the case of *Besley* v. *Besley* (2). I will refer to the way in which the law is stated by Lord *St. Leonards* (3). He says, "Where a man contracted for a copyhold estate for lives and paid part of the purchase-money, and was to pay the residue on taking up the copy, but was guilty of laches, yet, upon the seller's death when the manor went under a settlement to a remainderman not bound by the contract, the purchaser was permitted to recover the money in equity. But if the conveyance has been actually executed by all the necessary parties, and the

(1) 7 Ch. D. 620. (2) 9 Ch. D. 103.
(3) Sug. V. & P. 14th Ed. p. 549.

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purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at Law or in Equity."

Can anything be more broad than that? He investigates the title; he makes up his mind; he is advised that he may be his own conveyancer, as Sir *Charles Reade* was in a recent case when he did not employ a solicitor and I held him bound, and he suffered the consequences of a mistake. He may consult counsel; he has an opinion that the title is a good one; he pays his money; then although an ejectment is brought against him by a person who has the title paramount, the authorities are distinct that he cannot recover the amount of the purchase-money unless he has covenants for title which will protect him. Here it is put very distinctly: "But if the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at Law or in Equity." That he cannot recover at law the authorities referred to are *Cripps* v. *Reade* (1), *Johnson* v. *Johnson* (2), and *Bree* v. *Holbeck* (3). He passes on then to cite the well-known cases between pages 549 and 551, which all bear out that proposition, and particularly the case of *Thomas* v. *Powell* (4), which is a most remarkable case in which there was a dispute under a deed of covenant; the purchase-money was paid into Court, the conveyance had been executed, and before the purchase-money had been appropriated by the Court, or in any way used, it was discovered that the purchaser had acquired no title, and yet the Court refused to relieve him from a single penny of the purchase-money. The case of *Thomas* v. *Powell* is one upon which I very much relied in the case of *Manson* v. *Thacker* (5), which I again refer to as being the established and well-settled and most reasonable rule of the Court. Mr. *Dart* says (6): "With some few special exceptions a purchaser, after the conveyance is executed by all necessary parties, has no remedy at Law or in Equity in respect of any defects either in the title to, or quantity or quality of, the estate, which are not covered by the vendor's covenants."

(1) 6 T. R. 606.
(2) 3 Bos. & P. 162.
(3) Doug. 654.
(4) 2 Cox, 394.
(5) 7 Ch. D. 620.
(6) Dart, V. & P. 5th Ed. p. 777.

I do not think there is a more important principle than that a purchaser investigating a title must know that when he accepts the title, takes the conveyance, pays his purchase-money and is put into possession, there is an end to all as between him and the vendor on that purchase. If it were otherwise, what would be the consequence? A man sells an estate generally because he wants the money; if this were not the rule, he must keep the money at his banker's, and there never would be an end to the question; whereas by adhering to the rule, the purchaser is put into possession at once of his land, and the vendor has the purchase-money to dispose of as he thinks fit the moment after receiving it. There is one other authority which I wish to refer to, namely, *M'Culloch* v. *Gregory* (1), where Vice-Chancellor *Wood* lays down the rule that after the conveyance it is too late to rectify a mistake, and nothing can be done if a contract is once completed. Those are the authorities down to the time when *Manson* v. *Thacker* (2) was before me. I very fully considered the subject there, as I did in *Besley* v. *Besley* (3), and the cases which were referred to all concur with the conclusion at which I arrived. Then there is *Okill* v. *Whittaker* (4), which has been referred to on both sides, shewing that there can be no reopening of the contract after completion. Nothing can be more emphatic than the decision of Lord *Cottenham* in that case.

So the authorities stand except for the decision of the Master of the Rolls in the case of *In re Turner and Skelton* (5), of which there is this short account in the *Weekly Notes*, 1879, p. 151 (6). [His Lordship read from the *Weekly Notes*, and continued:—] The Master of the Rolls, having the authorities cited to him, and amongst others particularly my decision in *Manson* v. *Thacker*, declined to follow that decision, and allowed the question to be gone into after the completion of the purchase. One of the main reasons for doing so, as I understand, was, that the purchaser could not ascertain the quantity before. I am surprised, I must say, to find this said by the Master of the Rolls, because nothing can be clearer than this, that if a vendor sells a piece of land which he says contains 6½ acres it is the right of the purchaser

(1) 1 K. & J. 291.
(2) 7 Ch. D. 620.
(3) 9 Ch. D. 103.
(4) 2 Ph. 338.
(5) *Ante*, p. 130.
(6) Since reported, 13 Ch. D. 130.

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to measure that land, but if he also agreed that in case of any mistake it should be the subject of a reference to ascertain the value, if it should turn out not to be 6½ acres, the purchaser could claim to have a deduction from the purchase-money, or if it turned out to be more than 6½ acres, then he would have to pay so much more. What, then, is clearer than the right of the purchaser under such circumstances to enter upon the land and take the measurement? Suppose the vendor had refused permission to enter upon the land and take the measurement, and had brought an action for specific performance, what would have been the answer? You are not entitled to specific performance, because you most unreasonably refused to allow the purchaser to measure the land; you had no more right to refuse to allow him to measure the land and see that he got the quantity he contracted for, than you had to refuse him his title. I can only say that I very much regret that I am obliged to take an entirely different view from that of a Judge who is entitled to so much respect as the Master of the Rolls. All I can say is, that I retain strongly my former opinion, and upon that opinion I shall act until it is overruled. When that opinion is overruled by a superior Court, of course I shall bow to that decision, but until I find it laid down by the Court of Appeal that a purchaser is to be allowed to be lax in the conduct of his business, that he is to be allowed to lie by carelessly and discover things after the completion of the purchase which he ought to have discovered before, —until I find it decided by a superior tribunal that that is to be the rule of this Court, I shall adhere to my own view; because I believe that such a rule would be detrimental to the best interests of persons who are possessed of property. Therefore I am sorry to say that I entirely dissent from all that the Master of the Rolls appears to have said.

Then I think the only other point relied upon is, that this is a case of mutual mistake. It is only a mutual mistake in this way: it is quite clear the vendor believed that this letter would give the purchaser the advantage which it professed to give, and it was believed by the purchaser also, although, for reasons I have stated, he very readily might and ought to have discovered that it was otherwise. But what mutual mistake did they make? If

A. sells an estate, believing himself to have a good title, when he has not, and *B.* pays for it, believing the same thing, that is a mutual mistake, but it is a mutual mistake for which the purchaser will have to suffer, because, when he once takes a conveyance and pays his purchase-money, there is an end to the matter. The case of mutual mistake is such a case as *Cooper* v. *Phibbs* (1), where a man by mistake accepted a lease of his own property, that is, he took a lease of a property which turned out to be his own. Finding that he had taken a lease of his own property, which the lessor believed to be his, that was a case of mutual mistake. What was the justice of the case there? Why, to relieve the parties. It was a monstrous thing to say that a man should pay rent for his own property, therefore the principle which was followed was not that of giving the compensation which this purchaser claims—he will not give up the contract, but wants to force upon the vendor the obligation of fulfilling a contract different from that into which he entered. He says that the vendor should not receive £7600, which was the amount of the purchase-money, but £7600 less such sum as the Court may award as compensation for the vendor not having performed his contract. The principle on which the House of Lords acted in *Cooper* v. *Phibbs* was simply to rescind the contract, and thereupon relieve the parties from it.

The observations of Vice-Chancellor *Hall*, in the case of *Jones* v. *Clifford* (2), were applied in a case where there was a mutual mistake, where a man entered into a contract to have the property which was his own. The effect of Vice-Chancellor *Hall's* observations is, that the proper remedy in such a case is to relieve the parties from the contract. Even if that be so in this case, that is not the remedy which the purchaser claims; he has a counter-claim for damages. If his object were to have justice done to him and rescind the contract, instead of claiming damages he ought to have claimed that the contract be set aside on equitable grounds. A correspondence seems to have ensued; *Allen* finding himself £3300 short of his purchase-money, takes a very equitable view by writing a letter as early as the 3rd of October, in which he says, "I am prepared to refund the purchase-money, and retake

(1) Law Rep. 2 H. L. 149. (2) 3 Ch. D. 779, 792.

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possession of the property." Mr. *Glasse* says there was no offer to repay any outlay. The Plaintiff was not told there had been any outlay. The proper answer would have been to accept the offer on receiving back so much as the Defendant had expended on the property. In that case Mr. *Allen* would have looked at the property and seen whether the money had been judiciously expended; if he had found that it had been judiciously expended he would have said, "Yes, I will add the amount you have expended in improving the property." What was the course adopted? The Defendant never deigned to notice the letter. Here is an offer to do complete justice, and the Defendant takes no notice of it.

The defence to the specific performance of this contract, I think, in every point of view fails, and the Plaintiff is entitled to maintain his action for specific performance; therefore my opinion is that the Plaintiff is entitled to the relief which he asks; and the Defendant must pay the costs of the suit, and his counter-claim must be dismissed with costs.

Declaration, that the Plaintiff was entitled to have the contract of the 5th of June, 1877, specifically performed according to the conditions of sale. *Order*, that the lease should be reformed by reducing the rent to £105, and by inserting in the lease a covenant against Sunday trading, and that the Defendant should pay the Plaintiff the sum of £3300, with interest at 5 per cent. from the 5th of July, 1877, to the day of payment. Then an injunction restraining the Defendant until the execution by him of the counterpart of the lease, when reformed, from opening on Sundays, and the Defendant to pay the costs of the action, and the counter-claim to be dismissed with costs.

Solicitors for Plaintiff: *G. Brown & Sons.*
Solicitor for Defendant: *Milner.*

HANLEY *v.* PEARSON.

V.-C. B.

1879

Dec. 13.

[1879 H. 517.]

Deed—Mistake—Rectification—Evidence—Equitable Life Estate followed by Legal Remainder—Conveyance of outstanding Legal Estate—Form of Order for Rectification.

The Court will order rectification of a deed on the ground of mistake upon the evidence of the Plaintiff alone, where no further evidence can be obtained.

By a post-nuptial settlement, real estate belonging to the wife was conveyed unto *A.* and his heirs "to the use of" *A.*, his executors and administrators, during the life of the wife, "upon trust" to pay the rents and profits to her for her separate use; and from and after her decease, in case of the death of her husband in her lifetime, "to the use of the heirs and assigns" of the wife for ever: but in case of the wife predeceasing the husband, then to the use of the husband, his heirs and assigns for ever.

The wife having survived her husband, she brought an action against *A.'s* legal personal representative to have the settlement rectified on the ground that by a technical mistake in the form of the settlement her equitable life estate and the legal estate in remainder did not coalesce within the rule in *Shelley's Case*, so as to give her, as was intended in the events that had happened, an absolute estate in fee.

The Plaintiff's case was supported by an affidavit by herself alone:—

Held, that her uncontradicted affidavit was sufficient, and ordered that the settlement be rectified so as to vest the legal estate in fee simple to the Plaintiff:

Held, also, that a conveyance of the outstanding legal estate was unnecessary.

Form of order for rectification.

Smith v. *Iliffe* (1) discussed.

BY a post-nuptial settlement dated the 28th of November, 1859, to which the Plaintiff *Eliza Hanley*, her husband *James Hanley*, and *Joseph Pearson*, were parties, and which was duly acknowledged by Mrs. *Hanley*, certain real estate situate at *Amblecote*, in the county of *Stafford*, which belonged to Mrs. *Hanley* in fee simple, was conveyed "unto the said *Joseph Pearson* and his heirs," to the use of such person or persons as the said *James Hanley* and *Eliza Hanley* should jointly appoint, and, in default of appointment, "To the use of the said *Joseph Pearson*, his exe-

(1) Law Rep. 20 Eq. 666.

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cutors and administrators, during the life of the said *Eliza Hanley*, without impeachment of waste, upon trust" to pay the rents and profits to her for her separate use without power of anticipation: "and from and after the decease of the said *Eliza Hanley*, in case the said *James Hanley* shall have departed this life during the lifetime of the said *Eliza Hanley*, to the use of the heirs and assigns of the said *Eliza Hanley* for ever; but in case the said *Eliza Hanley* shall depart this life in the lifetime of the said *James Hanley*, then to the use of the said *James Hanley*, his heirs and assigns for ever."

The settlement contained no power of sale.

James Hanley died on the 18th of March, 1867, without having concurred with his wife in exercising their joint power of appointment under the settlement.

In the month of July, 1879, Mrs. *Hanley*, being under the impression that under the settlement and by reason of her having survived her husband she had become entitled to the property in fee simple, entered into a contract for sale of part thereof. Upon investigating the title the purchaser raised the objection that Mrs. *Hanley* was not in a position to dispose of the fee simple, on the ground that, inasmuch as under the limitations of the settlement her life estate was equitable and the estate limited to her heirs and assigns was legal, the two estates did not unite so as to give her the fee simple according to the rule in *Shelley's Case*, and therefore that she took a life estate only, with remainder to her heirs as purchasers.

Mrs. *Hanley* admitted the objection, but alleged that the intention of the parties at the date of the settlement was that in the events which had happened she should become absolutely entitled in fee simple to the settled property, and accordingly she brought this action to have the settlement rectified so as that, in the events which had happened, the property comprised in the settlement might be limited to the use of herself, her heirs and assigns, or otherwise vested in her for an absolute estate in fee simple in possession.

The Defendant was the legal personal representative of the trustee, *Pearson*, who had died.

The only evidence in support of the statement of claim consisted

—besides a merely formal affidavit proving the execution of the settlement—of an affidavit by the Plaintiff alone.

In this affidavit, after referring to the contract for sale and to the purchaser's objection, she said: "Until such objection was raised as aforesaid, I was entirely ignorant of the real nature or legal effect of the limitations of the said settlement. It was the intention both of myself and of my said husband when we executed the said settlement that the premises comprised therein should, in case I should survive my said husband, vest absolutely in myself, or be absolutely at my own disposal: and, in consenting to the settlement of my said property, I never had any intention of depriving myself of the power of selling or disposing of the whole or any part thereof, by will or otherwise, in case I should survive my said husband. I believed, on the contrary, when I executed and acknowledged the said settlement, that I had thereby full power, in the event of my surviving my said husband, to deal with the premises therein comprised in all respects as I pleased: and I say that in so far as the same settlement purports to deprive me of such power of disposition, it was executed under a wrong impression and under an entire mistake, and that if I had at all understood the legal effect of the limitations of the said settlement, I would never have executed the same in its present form, neither, as I firmly believe, would my said husband have done so."

The Plaintiff further stated that she had had no issue, and that her only near relatives were two brothers who were resident in *Canada*, and were, as she believed, entirely ignorant of the existence of the settlement: and that neither she nor her husband ever had any intention of benefiting her brothers by the settlement, or in fact any persons other than themselves.

It appeared that the Plaintiff's solicitors, in whose office the settlement of 1859 was prepared, had no recollection on the subject, except that the clerk who prepared it left them in 1868, and no evidence was obtainable from him.

G. Foster Cooke, for the Plaintiff:—

It is clear upon the authorities that the Court has jurisdiction to rectify a settlement executed under a mistake: the only question here is, whether, in the absence of other evidence which at

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this distance of time cannot be procured, the Court will rectify upon the evidence of the Plaintiff alone, having regard to the fact that the rectification is to be in her favour.

In *Smith* v. *Iliffe* (1) your Lordship ordered a settlement to be rectified upon the plaintiff's uncontradicted evidence.

[BACON, V.C.:—To the best of my recollection the evidence consisted of something more than the affidavit of the plaintiff alone, though this does not appear from the report.

Warmington:—Having been counsel for the plaintiff in that case, I think there was further evidence (2).]

At all events, in *Cook* v. *Fearn* (3) your Lordship made an order, it is expressly said, upon the affidavit of the plaintiff alone. There your Lordship said, "that though the case was supported by the evidence of the Plaintiff only, one kind of evidence was as good as another, provided its weight was sufficient to satisfy the Court."

I submit that in this case the Plaintiff's affidavit as to the mistake and as to the real intention of the parties is distinct and precise.

Should your Lordship think it a proper case for rectification, then I ask that a copy of the order may be indorsed on the settlement, as was done in *Smith* v. *Iliffe* (4), *Cook* v. *Fearn*, and in *White* v. *White* (5), according to which case a conveyance of the legal estate outstanding in the trustee will be unnecessary. Your Lordship will perhaps also initial the alteration, should the parties desire it.

Warmington, for the Defendant.

(1) Law Rep. 20 Eq. 666.

(2) The order in *Smith* v. *Iliffe*, as drawn up by the Registrar, is thus prefaced:—"Upon reading the indenture dated, &c., an affidavit of the Plaintiff and the exhibits therein referred to, and the admissions signed by the solicitors on both sides and the documents therein referred to." Reg. Lib. 1875, B. 1246.

In the recent case also of *Edwards* v. *Bingham* (28 W. R. 89), Vice-Chancellor *Malins*, following *Smith* v. *Iliffe* and *Cook* v. *Fearn*, ordered a settlement to be rectified upon the uncontradicted evidence of the plaintiff only.

(3) 27 W. R. 212. W.N. 1879 211.

(4) Law Rep. 20 Eq. 666.

(5) Law Rep. 15 Eq. 247.

BACON, V.C. :—

I think the Plaintiff's affidavit is sufficient, and I will therefore make an order for rectification as asked. A conveyance of the outstanding legal estate is unnecessary.

I will initial the alteration, if the parties desire it, as I did in *White* v. *White* (1), though, in my opinion, the order is sufficient without it.

The minutes of judgment were in the following form :—

Declare that the indenture of settlement dated the 28th November, 1859, in the statement of claim mentioned was executed under mistake in so far as in the events which have happened of the Plaintiff having survived her husband, *James Hanley*, in the said indenture named, and not having concurred with him in exercising the joint power of appointment reserved to them by the said indenture, it failed to vest the hereditaments and premises comprised therein in the Plaintiff for an estate in fee simple in possession, and that the said indenture was intended in the events aforesaid to vest the said hereditaments and premises in the Plaintiff for an estate in fee simple in possession; and that the Plaintiff is entitled to have the said indenture reformed and rectified in the manner hereinafter specified. And declare that, in the events which have happened as aforesaid, the said indenture of settlement ought to be reformed and rectified by omitting all limitations therein contained from and after the words "unto the said *Joseph Pearson* and his heirs" down to and inclusive of the words "to the use of the said *James Hanley*, his heirs and assigns for ever," and inserting in lieu of the said limitations the words "to the use of the said *Eliza Hanley*, her heirs and assigns for ever;" and let the said indenture of settlement be reformed and rectified accordingly; and let a copy of this order be endorsed on the said indenture; and this Court is of opinion that, upon the said indenture being so reformed and rectified as aforesaid, no conveyance of the legal estate previously outstanding thereunder during the life of the Plaintiff will be necessary. Liberty to apply.

Solicitors: *Gregory, Rowcliffes, & Rawle*, agents for *Bernard & King, Stourbridge.*

(1) Law Rep. 15 Eq. 247.

V.-C. B.

1879

Dec. 17.

DAVIES *v.* WILLIAMS.

Practice—Transfer from County Court—Ejectment Action—Discovery—Rules of Court, 1875, *Order* XXXI., *r.* 12.

In an action for the recovery of land, commenced by plaint in a County Court and afterwards transferred to the Chancery Division of the High Court, the proceedings after transfer will be conducted according to the practice of the High Court, so that the Plaintiff is not entitled to discovery and production until he has delivered a statement of claim in the action.

ADJOURNED SUMMONS on an application on the part of the Plaintiffs, in an action for ejectment commenced in the *Glamorganshire* County Court and by order transferred into the High Court, for discovery and production by the Defendants.

The action was commenced on the 30th of August, 1879, by plaint in the *Glamorganshire* County Court, directed "to the Defendant and all persons entitled to defend the possession of the property described in the statement hereunto annexed, situated, &c.," summoning them to appear at a County Court to be holden at *Neath* on the 21st of October, 1879, &c., to defend the property, or such part thereof as they might be advised.

On the 10th of October, 1879, an order was made by the Vacation Judge, upon the application of the Defendants, transferring the action from the County Court to the Chancery Division of the High Court of Justice.

The Plaintiffs, who had not delivered any statement of claim, had taken out a summons in the usual form for production and discovery, which was now adjourned into Court.

B. T. Williams, Q.C., and *Cruickshank*, for the Plaintiffs:—

This action having been transferred to the High Court under 28 & 29 Vict. c. 99, s. 3, for the purposes of trial only, the proceedings will continue to be regulated by the County Court practice. As, under that practice, no pleadings are required in an ejectment action, and production and discovery may be obtained immediately after proceedings have been commenced (County Court Rules, 1875, Order XIII., rule 1), the rule of the

High Court that a statement of claim must be delivered before production and inspection can be obtained by a Plaintiff does not apply in this case, and the Plaintiffs ought not, by not having delivered a statement of claim, to be deprived of the right to discovery to which they would have been clearly entitled if the proceedings had not been transferred.

[*Birks* v. *Silverwood* (1), *Cashin* v. *Craddock* (2), *London and Provincial Marine Insurance Company* v. *Davies* (3), and County Court Rules, 1875, Order VI., r. 1, Order VII., rr. 4, 5, were also cited.]

Sir *H. Jackson*, Q.C., and *T. Brett*, for the Defendants, opposed the application:—

When an action commenced in the County Court has been transferred to the High Court it is expressly enacted that "it shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein": *Judicature Act*, 1873, s. 90; and this is an attempt to apply the County Court practice to a transferred action. Production will not be ordered until a statement of claim has been delivered: *Cashin* v. *Craddock*; nor, even after the statement of claim has been delivered, until, by delivery of the statement of defence, the record is complete, so as to enable the Judge to know what are the matters in question in the action: *Hancock* v. *Guerin* (4). *A fortiori* will this rule be applied in an ejectment action where the Defendant is not put to affirmative proof of his title, and the Plaintiff, who can only recover by the strength of his own title, must not only deliver a statement of claim, but must, in his statement of claim, allege most specifically the nature of his title and claim: *Philipps* v. *Philipps* (5). Even in the County Court a Defendant in an action for the recovery of land cannot be put to proof of his title until a plaint has been filed or particulars delivered.

B. T. Williams, in reply:—

The plaint note in the County Court is equivalent to a statement

(1) Law Rep. 14 Eq. 101, 105.
(2) 2 Ch. D. 140.
(3) 5 Ch. D. 775.
(4) 4 Ex. D. 3.
(5) 4 Q. B. D. 127.

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of claim in the High Court, and it must be assumed that the officers of the High Court are acquainted with the County Court practice, which has been settled by Acts of Parliament and Rules of Court. The mere fact that the action is for ejectment does not exempt the Defendants from the obligation of making an affidavit of documents under Rules of Court, 1875, Order XXXI., rule 12: *New British Mutual Investment Company* v. *Peed* (1). As to the necessity of a complete record before an order can be made for production, *Hancock* v. *Guerin* (2) has been overruled by *Union Bank of London* v. *Manby* (3).

[*Ward* v. *Wyld* (4) was also referred to.]

BACON, V.C., said that, whatever might be the practice in the County Court, when the action was transferred into this Court, in order that justice might be administered between the parties, justice could only be administered according to the practice and after the rules of this Court, according to which the Plaintiff is not entitled to discovery and production until he has delivered a statement of claim. There was no record, nothing to shew what were the matters in question in this action in respect of which the Defendants were called upon to give discovery. When the Plaintiff had delivered his statement of claim, and the Defendants had had an opportunity of demurring or putting in a defence, the Court would then know what the matters in question were. Until that time the Court was quite in the dark, and the Defendants could not be forced to make an affidavit when they did not know what case they had to meet. There was no foundation for this application, and it must be refused with costs.

Solicitors: *Crowder, Anstie, & Vizard; Remnant & Penley.*

(1) 3 C. P. D. 196.
(2) 4 Ex. D. 3.
(3) *Ante*, p. 239.
(4) 5 Ch. D. 779.

BENBOW *v.* LOW.

V.-C. B.

1880

Feb. 6.

[1879 B. 415.]

Practice—Counter-claim—Reply—Joinder of Issue generally—Rules of Court, 1875, *Order* XIX., *rr.* 18, 20, 21.

Plaintiffs asserted the right to use Defendants' name as a trade name, for goods manufactured and sold by themselves, and, alleging that they had recently heard that the Defendants claimed the exclusive right to the name, claimed a declaration that the Plaintiffs were entitled to use the name, and also an injunction to restrain the Defendants from representing that the goods manufactured by them, the Plaintiffs, were an imitation of the goods manufactured by the Defendants.

The Defendants by their statement of defence made a number of allegations as to the origin and history of the manufacture, and stated that they had discovered that the Plaintiffs had recently sold goods manufactured by them (the Plaintiffs) with a mark greatly resembling that of the Defendants. Then, by counter-claim, the Defendants repeated and relied on the allegations as if they had been repeated verbatim, and, alleging misrepresentation, claimed an injunction to restrain the Plaintiffs from selling goods not manufactured by the Defendants, as and for goods manufactured by the Defendants.

To the counter-claim the Plaintiffs replied by joining issue:—

Held, that the allegations in the counter-claim must be specifically dealt with, and that the reply was irregular.

MOTION.

The Plaintiffs *Henry* and *Francis Benbow*, trading under the firm of "*Benbow & Sons*," claimed against the Defendants *Alfred Low* and *Robert Thomas Haydon*, trading as "*Low, Son, & Haydon*," a declaration that the Plaintiffs were entitled to make and manufacture highly perfumed brown *Windsor* soap from an original receipt mentioned in the statement of claim, and to sell the same under the name of "*Low's Highly Perfumed Brown Windsor Soap*," with or without certain labels in the statement of claim mentioned, and that the Plaintiffs might be quieted in their rights thereto; also that the Defendants might be restrained from alleging or representing that the soap manufactured by the Plaintiffs was an imitation of the soap manufactured by the Defendants, or from interfering with the Plaintiffs in respect to the

V.-C. B. 1880

BENBOW v. LOW.

manufacture of such soap under the aforesaid name, and in the use of the said labels; and for damages.

The statement of claim stated that prior to the death, in 1847, of *Robert Low* the elder, he and his son *Robert Low* carried on the business of a wholesale and retail soap manufacturer at 330 *Strand*. In the course of the same year, 1847, *Robert Low* the elder sold his share in the business to *George Henry Benbow*, and died; and the partnership thereupon constituted between *G. H. Benbow* and *Robert Low*, the son, expired in 1861. In the course of that year, *G. H. Benbow* set up business in partnership with his son, the Plaintiff *Henry*, as wholesale and retail soap manufacturers, at 12, *Little Britain*, in the city of *London;* and they, with the full knowledge and consent of *Robert Low*, continued to manufacture and sell highly perfumed brown *Windsor* soap from the original receipt of *Robert Low* the elder, in wrappers with labels on them having the words "*Low's Highly Perfumed Brown Windsor Soap*" . . . "Prepared by *G. H. Benbow*, late of the firm of *Low, Son, & Benbow.*"

The claim further stated that after a time *G. H. Benbow* and *Henry*, his son, took another son of *G. H. Benbow*, the Plaintiff *Francis*, into partnership; and that *G. H. Benbow* died in 1876. It then alleged (paragraph 9) that the Plaintiffs carried on a large export business in soap, which they sold in wrappers described as above; and (paragraph 10) that the Plaintiffs had recently learnt that the Defendants now claimed the exclusive right to use the words "*Low's Highly Perfumed Brown Windsor Soap.*"

The Defendants delivered a statement of defence, which in paragraphs 1 to 13 stated in effect that in about 1800 *Robert Low*, the grandfather, invented a recipe for making brown *Windsor* soap; that he manufactured soap according to this receipt, and sold it in wrappers with labels having certain words and designs on them; that these words and designs were figured in the *Trade Marks Journal* of the 17th of September, 1879; that in about 1830 *R. Low*, the grandfather, took his son *Robert Low*, father of the Defendant *Alfred Low*, into partnership, and the two continued the business at 330 *Strand* until the death of *R. Low*, the grandfather, in 1847; that *R. Low*, the grandfather, shortly before his death, with the knowledge and assent of *R. Low*, his son, entered

into a conditional agreement to sell to *G. H. Benbow* his share in the business, and died, having by will, proved on the 12th of January, 1848, appointed *R. Low*, his son, his executor; that by an indenture dated the 18th of February, 1848, a partnership was agreed upon by *R. Low* and *G. H. Benbow* for fourteen years; that by another indenture, dated the 1st of January, 1862, it was agreed that the partnership should be dissolved, and, in consideration of £2000 paid by *R. Low* to *G. H. Benbow*, and other considerations, *Benbow* assigned to *Low* his share of the business premises, and of the stock and effects of the partnership, upon trust for realization and division between *Low* and *Benbow;* that *R. Low* then took the Defendant *R. T. Haydon*, and subsequently the Defendant *Alfred Low*, into partnership, and died on the 18th of November, 1874; that the business of a soap manufacturer had been since 1843 carried on at 330 *Strand* by the Defendants to a large extent; that shortly after the 1st of January, 1862, *Low*, the father, discovered that *G. H. Benbow's* firm had sold some soap in wrappers resembling those of the firm of *Low, Son, & Haydon*, and threatened proceedings, whereupon *Benbow's* firm desisted; that at about the end of 1848 the Defendants discovered through agents in *America* that the Plaintiffs had effected a sale of soap not manufactured by the Defendants in wrappers, bearing on them the Plaintiffs' alleged trade-mark, whereupon the Defendants had taken proceedings in *America*, and obtained a perpetual injunction against the Plaintiffs; that the Defendants had discovered that the Plaintiffs had recently made other sales of such soap having the same alleged trade-mark; that the Plaintiffs had applied to have their alleged trade-mark registered, and that, the Defendants opposing, the questions were ordered to stand to the hearing of the present action; that the Defendants had, on the 1st of August, 1879, applied to have their trade-mark registered, and that no notice of opposition had up to the 10th of December, 1879, been given.

Paragraph 20 of the statement of defence alleged that the Plaintiffs affixed to packets of soap sold by them a label of a particular shape, which made them more closely resemble the packets sold by the Defendants. It further denied the statements in paragraphs 9 and 10 of the statement of claim.

V.-C. B. 1880 BENBOW v. LOW.

The Defendants also, by way of counter-claim, repeated and relied on each and every of the statements in paragraphs 1 to 13, and in paragraph 20, of the statement of defence, as if they had been repeated verbatim. They then alleged that the Plaintiffs had recently commenced to manufacture soap and sell the same in wrappers and labels bearing the Plaintiffs' alleged trade-mark, and calculated to induce customers to believe that the soap manufactured by them was manufactured by the Defendants, and claimed relief, not on the ground of infringement of trade-mark, but on the ground of misrepresentation; and claimed an injunction accordingly.

The Plaintiffs delivered a reply, in which they joined issue with the Defendants upon their statement of defence, and (paragraph 2) with respect to the statements contained in the counter-claim, joined issue on paragraphs 1 to 13 and on paragraph 20 of the statement of defence.

The Defendants moved that paragraph 2 of the reply might be struck out.

Byrne, for the motion:—

The Plaintiffs are bound to deal with the allegations in paragraphs 1 to 13 specifically. We are entitled to know how they answer the case which we make against them. The case is clearly within rule 20 of Order XIX. of the Rules of Court, 1875.

Willis-Bund, for the Plaintiffs:—

The practice is governed by the authority of *Rolfe* v. *Maclaren* (1). There is nothing in these allegations to take them out of the range of that decision.

BACON, V.C.:—

With the greatest respect for the decision in *Rolfe* v. *Maclaren*, what I have to deal with here is the rule. The 20th rule of Order XIX. is very plain, and it is the only guide which I can follow on this occasion. The grounds for the 20th rule are to be found in previous rules of the same Order, and I think that by merely joining issue the Plaintiffs do not fulfil the requirements

(1) 3 Ch. D. 106.

of the 20th rule, which says that each party must deal specifically with each allegation of fact of which he does not admit the truth. There will be liberty to amend.

Willis-Bund asked that the costs of the motion might be costs in the action.

BACON, V.C.:—

No, I think not; there has been an error in pleading, and the Plaintiffs must pay the costs of the motion.

Solicitor for Plaintiffs: *C. E. Withall.*
Solicitors for Defendants: *Lucas & Son.*

V.-C. H.

1879

Nov. 19, 24, 25.

MASSEY *v.* ALLEN.

[1876 M. 265.]

Evidence—Admissibility—Purchase of Shares—Stockbroker's Day-book—Entries by Deceased Partner.

During the trial of an action to establish the Plaintiff's right to be indemnified by the two Defendants, or one of them, in respect of 200 shares transferred into the Plaintiff's name as trustee for the Defendants or one of them, the Plaintiff desired to prove that the shares had been bought on the *Stock Exchange* for one of the Defendants through his brokers, Messrs. *G. & D.* *G.* was dead, and the Plaintiff tendered in evidence an entry in the day-book of the firm of a purchase of 200 shares by *G.* for the particular Defendant; and, having proved that the entry was in the handwriting of *G.*, that it was made by him in the ordinary course of business at the time of the purchase as a memorandum of the transaction, and that the ledger of the firm was made up from the day-book, contended that it was admissible in evidence as a declaration made by a deceased person, first, because it was made against the pecuniary interest of the person making it; and, secondly, because it had been made in the ordinary course of business:—

Held, that it was not admissible upon the first ground, because it might, according to the turn of the market, have been to the advantage of the deceased; nor upon the second ground, because it was not made in the performance of any duty.

THIS action was brought by the official liquidator of the *International Contract Company* in the name of Mr. *John Daniel Massey*, who was formerly the chief cashier in the head office of the *Bank of London*, and had died since the commencement of the action, against Messrs. *Charles J. Allen* and *Benjamin Hardwick*, who were respectively the secretary of the bank and the former solicitor of the company, in order to obtain a declaration that the Defendants, or one of them, were or was bound to indemnify the Plaintiff against all liability in respect of 200 shares in the company in respect of which the Plaintiff had, on the 3rd of September, 1870, been fixed upon the B list of contributories to the company. The case made on behalf of the Plaintiff was that he permitted the shares in question to be transferred into his name at the request and for the convenience of *Allen*, his superior officer in the bank, and under the belief that he would not be subjected to any pecuniary liability in respect of them; that they were in reality bought for or belonged to either *Allen* or *Hardwick*, and that the

Plaintiff was only a trustee of the shares for one or both of the Defendants.

During the hearing of the action it was desired on behalf of the Plaintiff to prove that the shares in question had been bought by the Defendant *Allen* in 1864.

It was proved that the transfer of the 200 shares to the Plaintiff was registered in the books of the company on the 4th of August, 1864; that the transfer deeds of the various parcels of shares (seven in number) making up the 200, which all bore date between the 19th and the 23rd of July, 1864, were delivered at the office of the company for registration by Messrs. *Griffiths & Druitt*, stockbrokers, and that the certificates of the registration of the transfer of the shares were delivered on the 11th of August, 1864, to one *W. H. Britten*, who was a clerk of *Griffiths & Druitt*.

It was also proved that *Griffiths & Druitt* were the stockbrokers of the Defendant *Allen*, and that *Griffiths*, who transacted the greater part of the business of the firm, was dead, and in order to prove that the 200 shares, the transfers of which were so registered and certified, had been bought on the *Stock Exchange* by *Griffiths & Druitt*, through *Griffiths*, for the Defendant *Allen*, the counsel for the Plaintiff tendered in evidence entries in the day-book and the ledger of the firm.

It appeared from the evidence of Mr. *H. C. Griffiths*, the son of the deceased, and formerly a clerk in the service of the firm, that the day-book contained entries, in the handwriting of the deceased, of the transactions of the firm, made in the ordinary course of business on the same day on which the transactions took place, and that the contracts were made out and the ledger was made up from the entries in the day-book.

The entries which, as will be seen, were admitted *de bene esse*, were as follows:—

In the day-book, under the heading of the 26th of April, 1864:—

	£	s.	d.
International Ct. 18 July			
Bot. for *C. J. Allen*			
200 Inter. Cont. 5 p. c.—2/	1400	0	0
½ comm.	6	5	0
Stp.	5	2	6

				£	s.	d.
	£	s.	d.			
C. Allen	1406	5	0			
N. Morris	1400	0	0			
				6	5	0

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In the ledger:—

Dr.—*C. J. H. Allen*, Esq. *C. J. H. Allen*, Esq.—Cr.

		£	s.	d.		£	s.	d.
July 18	26 April.				April 26, ½ com. 19 July	6	5	0
	200 Internl. Cont. sh.							
	5 p. 2	1412	10	0				
	Sum and com.							
	19 July, stp. 5 p. 2/6	5	2	6	19 July, cash . .	1000	0	0
	Draft	6	5	0	„ do. . .	417	12	6

The witness in his evidence explained that the entry in the day-book meant that on the 26th of April, 1864, 200 shares with £5 paid on them were bought at 2 premium for £1400, from *Norman Morris* (a stockjobber), for *C. J. Allen*, and that *C. J. Allen* was charged £1406 5*s.* for the purchase-money and half the commission, and that the 18th of July was the settling-day; and that the entry in the ledger was made when the shares were settled for, and shewed that Mr. *Allen* was debited with the purchase-money of 200 shares as bought on the 26th of April, which with £12 10*s.* as the full commission amounted to £1412 10*s.*, while he was at the same time credited with £6 5*s.*, the half commission allowed him on all his transactions. Then, on the 19th of July, he was debited with £5 2*s.* 6*d.* for the stamp and fee.

The admissibility of the entry in the ledger was not disputed, and the arguments were directed to the entry in the day-book.

Higgins, Q.C., and *Whitehorne*, for the Plaintiff:—

This entry is admissible in evidence, first, because it was *primâ facie* against the interest of the deceased person who made it. The rule, as stated in *Stephen's* Digest of the Law of Evidence (1) is, that a statement or declaration by a deceased person is relevant and admissible "if the declarant had peculiar means of knowing the matter stated, if he had no reason to misstate it, and if it was opposed to his pecuniary or proprietary interest;" and a declaration is to be considered against pecuniary interest if part of it charges the person who made it with liability, although other part of the book or document may discharge him in whole or in part. By the entry the broker bound himself to deliver

(1) 3rd Ed. art. 28, p. 35.

shares at the price named. It is none the less a charge because (as every entry by an agent must do) it operates as a discharge also. The authorities by which this rule is established are:— *Higham* v. *Ridgway* (1); *Smith's* Leading Cases (2); *Gleadow* v. *Atkin* (3), where *Bayley*, J., explained *Roe* v. *Rawlings* (4); and *Taylor* v. *Witham* (5), where the Master of the Rolls adopted the view of *Parke*, B., in *Reg.* v. *Inhabitants of Lower Heyford* (6), and dissented from *Littledale*, J., in *Doe* v. *Vowles* (7). See also *Goss* v. *Watlington* (8).

Secondly. It is admissible as made "in the ordinary course of business" or "in the discharge of duty" at or near the time of the transaction and of the knowledge of the declarant himself: *Stephen's* Digest (9); *Price* v. *Lord Torrington* (10); *Rawlins* v. *Rickards* (11); *Reg.* v. *Overseers of Birmingham* (12).

Hastings, Q.C., and *Henry Fellows*, for the Defendant *Allen*:—

The entry in the day-book is not admissible upon the first ground of contention, because it might turn out to the advantage of the person who made it: *Smith* v. *Blakey* (13); as, for instance, if the market price of the shares fell. Nor is it admissible upon the second ground, because, although made in the ordinary course of business, it was a mere memorandum not made in the discharge of any duty: *Taylor* on Evidence (14); *Chambers* v. *Bernasconi* (15); *Smith* v. *Blakey*; *Doe* v. *Turford* (16); *Polini* v. *Gray* (17); *Bright* v. *Legerton* (18).

W. Pearson, Q.C., and *Cozens-Hardy*, for the Defendant *Hardwick*.

Higgins, in reply.

(1) 10 East, 109.
(2) 8th Ed. vol. ii. p. 331.
(3) 1 C. & M. 423.
(4) 7 East, 279.
(5) 3 Ch. D. 605.
(6) 2 Sm. L. C. 8th Ed. p. 346.
(7) 1 M. & Rob. 261.
(8) 3 B. & B. 132.
(9) Art. 27.
(10) 1 Salk. 285; 2 Ld. Raym. 873; 1 Sm. L. C. 8th Ed. p. 344.
(11) 28 Beav. 370.
(12) 1 B. & S. 763.
(13) Law Rep. 2 Q. B. 326.
(14) Chap. xii. sect. 708, p. 599.
(15) 1 C. M. & R. 347; 4 Tyrw. 531.
(16) 3 B. & Ad. 890.
(17) 12 Ch. D. 411.
(18) 2 D. F. & J. 606; 29 Beav. 60.

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HALL, V.C. :—

I cannot at present exclude this evidence, and I shall admit it *de bene esse*, and consider it or not as may appear to me proper when I dispose of the case.

The case was then heard upon the merits, which do not call for a report.

Nov. 25. HALL, V.C., delivered judgment for both Defendants with costs, saying, at the conclusion of his decision upon the merits :—

In the course of the arguments in this case a question arose as to the admissibility of certain documents, and inasmuch as I admitted them *de bene esse*, and for the purpose of the judgment which is to be drawn up they either ought or ought not be entered as read, I think it right to consider that question, and to express my opinion upon it. The first of these documents was the day-book, and it was attempted to put in evidence an entry therein, upon two grounds, the first of which was that it was made against the pecuniary interest of the person who made it. But I am not satisfied that that entry can be considered to have been made against pecuniary interest within the meaning of the rule. It appears to me that I ought to adopt the language of the judgment in *Smith* v. *Blakey* (1), where Mr. Justice *Blackburn* says: "When entries are against the pecuniary interest of the person making them, and never could be made available for the person himself, there is such a probability of the truth that such statements have been admitted after the death of the person making them, as evidence against third persons." The words are, "never could be made available." If this day-book were used as evidence of a contract, I suppose it might be contended after the death of the person who made the entry (who in this case is a broker) that the entry, being against his interest, would be admissible upon the question whether he had purchased the shares or not for his principal, Mr. *Allen*. It might be admissible possibly if used by way of admission against the broker, but in order to be admissible as a declaration against interest, the entry must, I take it, be one

(1) Law Rep. 2 Q. B. 326, 331.

which under no circumstances could operate for the advantage or benefit of the party who made it. That being so, it appears to me that the entry in this case might, according to the turn of the market, possibly prove to be for the advantage of the broker, provided always that he was not bound to deliver any specific shares. I am not satisfied that that does come within the meaning of the rule about entries against pecuniary interest, and I decline to admit the book on that ground. The other ground is that it is an entry made in the ordinary course of business. As to that, in order to be admissible, the entry must be made in the course of business in the performance of a duty. I cannot say that it is established in this case that it was the duty of the broker as between himself and his client Mr. *Allen* to keep that day-book. Reference was made to *Doe* v. *Turford* (1), where an entry on the back of a notice to quit by a deceased solicitor was held to be admissible in evidence; and it has been argued that that case was an authority that such an entry as this would be admissible. But in *Doe* v. *Turford* the ground of admission seems to have been this,—It was shewn to have been the regular course of business in the solicitor's office for the clerks to make, and that they always did make, certain indorsements upon all notices to quit. In the particular instance in that case the principal himself made the entry, and it was held that such entry was made in discharge of the duty of a clerk in that respect; that from the very nature of the thing, the putting of the entry on the back of the notice to quit was, in fact, in performance of a duty, and that it was the duty of the principal himself, under the circumstances, and having regard to the nature of the transaction, to make that indorsement upon the back of the notice. I do not therefore consider that *Doe* v. *Turford* is an authority which would make this entry admissible. *Doe* v. *Turford* was cited in *Smith* v. *Blakey* (2), and also in *Bright* v. *Legerton* (3), where Lord *Campbell* reversed the decision of the Master of the Rolls as to the admissibility of one document, but admitted some other documents on certain special grounds; and he expressly laid down that the entries in the solicitor's book in that

(1) 3 B. & Ad. 890. (2) Law Rep. 2 Q. B. 326.
(3) 2 D. F. & J. 606; 29 Beav. 60.

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case would not have been evidence if they had not in fact been dealt with and adopted by the persons against whom they were intended to be used. It seems to me, therefore, that the day-book was not admissible in evidence, and ought not to be entered as read.

The ledger will be admitted and taken as read.

Solicitors: *Munns & Longden; Stibbard, Gibson, & Co.; Hardwick & Jones.*

V.-C. H. 1879 *Nov.* 28.

WILKINS *v.* JODRELL.

[1861 W. 245.]

Will—Construction—Annuity to Children for their "Maintenance and Education"—Duration of.

A testator by his will gave to a woman an annuity of £100, and directed as follows: "In the event of her death the annuity is to be continued to her children for their maintenance and education, and I have to request" *W. G.* "to see it carried into execution." The woman survived the testator and received the annuity up to her death, at which time all her six children had attained twenty-one:—

Held, first, that the words "in the event of her death" could not be construed as only providing against a lapse of the annuity, and that the annuity took effect in favour of the children:

Secondly, that the annuity was not confined to the minorities of the children, but was payable to them during their joint lives and to the survivors and survivor of them during their and his life, the children for the time being entitled as joint tenants.

Soames v. *Martin* (1) followed.

Gardner v. *Barker* (2) observed upon.

Knapp v. *Noyes* (3) explained.

PETITION.

The late Admiral Sir *Charles Napier*, K.C.B., by his will dated in 1848, devised and bequeathed all his real and personal estate, "subject only to the payment of his just debts, funeral and testamentary expenses, and pecuniary legacies," to trustees upon certain trusts therein declared, and appointed the trustees his executors.

(1) 10 Sim. 287. (2) 18 Jur. 508.

(3) Amb. 661.

In 1855 the testator made a codicil in the following terms:—

"This is a codicil to my last will and testament, viz., I leave to *Mary Anne Bettesworth*, widow of *Charles Wilkins*, an annuity of £100 a year, and all my furniture in *Albemarle Street*. In the event of her death the annuity is to be continued to her children for their maintenance and education; and I have to request Mr. *William Grant*, banker at *Portsmouth*, to see it carried into execution. The furniture of the house in *Albemarle Street* in the event of her death to be sold for the benefit of her children. The £100 a year to be paid in advance."

The testator died in the year 1860.

M. A. Wilkins survived the testator, and had six children.

In the year 1862 *M. A. Wilkins* and her six children, who had all attained twenty-one, instituted a suit against the trustees and executors of the will to have the rights and interests of all parties under the codicil declared and secured by the Court; and pursuant to an order in that suit made in April, 1863, a sum, £3333 6*s.* 8*d.*, of Bank £3 per Cent. Annuities was carried over to a separate account, and the dividends thereon were paid to *M. A. Wilkins* during her life.

M. A. Wilkins having recently died, a petition was now presented on behalf of some of her children to have the above-mentioned sum of stock distributed amongst the six children, or their representatives, in equal shares.

The questions argued were, first, whether, as the annuity was given to the children "in the event of" their mother's decease, and she survived the testator, it ever took effect at all in favour of the children; secondly, if it did, whether it was confined to their respective minorities; thirdly, if not, whether it was perpetual, so as to entitle them to the fund, or was confined to their lives and the life of the survivor of them.

Hastings, Q.C., and *S. Dickinson*, for the Petitioners:—

It may be contended that the annuity to the children was only to take effect in case the mother died in the lifetime of the testator. But this cannot be so, for the words "to be continued" shew that an event was being provided for which was to happen after

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the annuity became payable, and therefore that the words "in the event of her death" do not refer to death in the lifetime of the testator, and that the testator intended the children to be maintained and educated whether their mother died or not. The gift then having taken effect in favour of the children, the annuity is not confined to their respective minorities, but lasts at least during their lives and the life of the survivor of them.

The gift is for two objects, "maintenance and education;" and while "education" does not necessarily or ordinarily cease at twenty-one, "maintenance" is required as long as life exists.

In *Lewes* v. *Lewes* (1), a gift for "the maintenance, clothing, and education" of children was held to be "equivalent to a gift for the benefit of" the children; and in *Webb* v. *Kelly* (2) it was held that a gift for the maintenance and education of the legatee was an absolute gift.

In *Soames* v. *Martin* (3), where a testator had directed the interest of a sum of money to be applied for the maintenance and education of an infant, but had made no disposition of the principal, Sir *L. Shadwell*, Vice-Chancellor of *England*, held that the infant was entitled to the interest during his life, and distinguished the case of *Badham* v. *Mee* (4), where a child was held entitled during his minority only, on the ground that in that case "bringing up," which necessarily applied to the infant state, was associated with maintenance and education as one of the objects of the gift, adding, "all persons who have attained twenty-one are not in a state in which they do not want education, and there is no period of life in which a person does not require maintenance." The soundness of the decision in *Badham* v. *Mee* is, however, questionable, for a gift for several purposes should not cease so long as any one of them continues to exist.

Again, *Bayne* v. *Crowther* (5), and *Attwood* v. *Alford* (6), where the gift was for "maintenance" only, and *Younghusband* v. *Gisborne* (7), where the gift was for support, clothing, and maintenance, are authorities in our favour. As also is a recent case of

(1) 16 Sim. 266.
(2) 9 Sim. 469.
(3) 10 Sim. 287.
(4) 1 Russ. & My. 631.
(5) 20 Beav. 400.
(6) Law Rep. 2 Eq. 479.
(7) 1 Coll. 400.

Quale v. *Spedding*, decided by your Lordship on the 28th of June, 1877, where a gift of an annual sum for the maintenance and education of an infant was held to confer upon him an annuity during his life. That case, however, has not been reported.

We contend, however, in this case, that the annuity is perpetual, and that the children are entitled to the capital of the fund set aside to answer it, the testator having charged his pecuniary legacies, and consequently this annuity upon his real as well as his personal estate: *Evans* v. *Walker* (1); *Bent* v. *Cullen* (2); *Potter* v. *Baker* (3); *Robinson* v. *Hunt* (4). The cases in which gifts for maintenance and education have been held not to confer absolute interests are those where the gift is to a person for the maintenance and education of others, and not, as here, where the gift is to the persons themselves, where it is held only to be the motive in making the gift. At all events, the children are entitled during their lives and the life of the survivor of them.

[They also referred to *Jarman* on Wills (5).]

Eddis, Q.C., and *J. W. Williamson*, for the residuary legatees and executors of the will:—

The annuity never took effect at all in favour of the children, for the words "in the event of her death" must be construed to refer to death in the testator's lifetime, and to have been introduced in order to avoid a lapse of the gift: *Schenk* v. *Agnew* (6). But if it did take effect, it only continued during the minority of the children.

So far back as *Knapp* v. *Noyes* (7), Lord *Camden* laid down generally that "maintenance and education are confined to minority." As to the cases cited on behalf of the Petitioners, in *Lewes* v. *Lewes* (8), *Webb* v. *Kelly* (9), and *Attwood* v. *Alford* (10), the gift was during the life of a third person; and in *Young-*

(1) 3 Ch. D. 211.
(2) Law Rep. 6 Ch. 235.
(3) 15 Beav. 489.
(4) 4 Beav. 450.
(5) 3rd Ed. p. 367.
(6) 4 K. & J. 405.
(7) Amb. 662.
(8) 16 Sim. 266.
(9) 9 Sim. 469.
(10) Law Rep. 2 Eq. 479.

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husband v. *Gisborne* (1) it was to an adult; so in none of these cases could the gift be confined to the minority of the taker. The only authority which supports the contention of the other side is *Soames* v. *Martin* (2); but doubts have been thrown upon that decision by the case of *Gardner* v. *Barker* (3), where Vice-Chancellor *Wood* carefully considered the point, and, after remarking that *Knapp* v. *Noyes* (4) had not been cited in *Badham* v. *Mee* (5), declined to follow *Badham* v. *Mee*, and held that, under a gift to *A.* for the maintenance and education of *B.*, *A.* was only bound to maintain *B.* during his minority. A decision in favour of the Petitioners would, therefore, overrule *Gardner* v. *Barker*. We also claim *Foley* v. *Parry* (6) as an authority in our favour. Lastly, the request in the codicil to Mr. *Grant* to see the annuity "carried into execution" shews that in the view of the testator the annuitants would not be able to see to it themselves, *i.e.*, that the gift was confined to their minorities.

Hastings, in reply:—

It is an entire mistake to suppose that Lord *Camden*, in *Knapp* v. *Noyes*, laid down as a general proposition that "maintenance and education are confined to minority." He obviously meant that they were so confined by the language used by the testator in the will before him; and this being so, a misconception lies at the root of the judgment in *Gardner* v. *Barker*; and, moreover, *Gardner* v. *Barker* and *Foley* v. *Parry* were both cases of trust with special circumstances, and education is not, after twenty-one, a proper subject of a trust. There is, therefore, no single case in which a gift to *A.* for his maintenance and education has been confined to his minority, while *Soames* v. *Martin* is a direct authority to the contrary, and in our favour.

[HALL, V.C.:—It does not clearly appear from the report of *Soames* v. *Martin* what the exact form of the gift was; it is more likely than not that there was a trust.]

If so, the case is *res integra*, the Court is unfettered by autho-

(1) 1 Coll. 400.
(2) 10 Sim. 287.
(3) 18 Jur. 508.
(4) Amb. 661.
(5) 1 Russ. & My. 631.
(6) 2 My. & K. 138; 5 Sim. 138.

rity, and at liberty to decide the clear point according to the primary and common-sense view of the question.

HALL, V.C.:—

The case of *Quale* v. *Spedding* has been mentioned as one in which a point similar to that now before the Court had been recently decided by myself. That case is not reported, but the reporter has been good enough to explain to me what was the nature of it, and there is no doubt that he was quite right in not reporting it; for, from what he stated to me, it is quite clear that the case turned on its own special circumstances, and so, like all other cases turning on special circumstances, it was much better not to report it. That case, therefore, being out of the way, I proceed to consider what is the true construction of this codicil, having regard to the authorities which have been brought to my attention.

The first argument on behalf of the Respondents was, that this annuity never came into existence at all, owing to the circumstance that *Mary Ann Bettesworth* survived the testator. It appears to me, however, to be clear that the words of the codicil are words of gift importing the continuance of something already given, and which, by the form of the gift, is supposed to have actually come into operation; and that, therefore, the case is not within the authorities referred to, in which the words "in the event of her death," following a gift of a particular fund, have been held as only providing against a case of lapse. I therefore hold that this annuity did continue, although the first person to take died in the lifetime of the testator.

The next question is whether the annuity was perpetual. Now it appears to me that, for the purpose of deciding this, I must take into consideration the object and purpose of the gift. The annuity is given for the "maintenance and education" of the children, and although in the case of a gift to a person for a particular purpose, the person to whom the gift is made is ordinarily entitled when of full age to demand that the money shall be paid to him directly and not applied for the particular purpose, still, where the question is how long an annuity is to endure, it is important to attend to the object and purpose of the gift. Having

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regard then to the words "for their maintenance and education," it appears to me obvious that the annuity was meant to be for the personal enjoyment and benefit of the annuitants, and therefore that it was not meant to be continued beyond their lives.

The next question, which is the important one, is, whether the annuity determined when the youngest child attained twenty-one; and it is, upon the authorities, a question of very considerable difficulty, the judgments and views of the Vice-Chancellor of *England* and of Vice-Chancellor *Wood* being apparently opposed to one another. The Vice-Chancellor *Wood* considered that a gift for maintenance or education would of itself convey to the mind that it was only to last during minority, though not actually in terms so confined. That, I think, must be taken to be his view, from the case of *Gardner* v. *Barker* (1). On the other hand, the view of the Vice-Chancellor of *England* in *Soames* v. *Martin* (2) seems to have been different. He considered that there was nothing to confine a provision for a person's maintenance and education to the minority of that person. It was given for two purposes, maintenance and education, and while maintenance would certainly last beyond minority, education would not necessarily end with minority. I do not myself see why it should. There was a time when education came to an end much sooner than it does at present, and I think there was a Lord Chancellor in our own time who left *Oxford* before twenty-one. But education at the present day, amongst persons in a certain class and position in life, ordinarily lasts beyond twenty-one; and I should say myself that a provision for education, according to the ordinary purpose and meaning of such a provision, is not limited to the age of twenty-one; and if so, why should maintenance, which is another object of the gift, be limited to twenty-one being associated with education? Of course education ceases at a certain time, according to the particular purpose for which the person is to be educated, but maintenance is required and lasts during his whole life; and giving a fair construction to such a provision, whether it be by way of trust or by way of gift, there is, in my opinion, nothing to limit it to minority. And there is, I think, no difference between a trust for "maintenance *or* education" and a trust

(1) 18 Jur. 508. (2) 10 Sim. 287.

for "maintenance and education." The association of the words "bringing up" (as in *Badham* v. *Mee* (1)), may, if all the words are to be read conjunctively as meaning that all the three things, viz., maintenance, education, and bringing up, are to go on together (which I do not think is a very sound reading of them), limit the operation of the trust or provision to the period of twenty-one; that being the ordinary period of "bringing up." I have already said what was Vice-Chancellor *Wood's* view in *Gardner* v. *Barker* (2). I think it plain, from the observations made by Vice-Chancellor *Wood*, in commenting upon the decision of the Vice-Chancellor of *England* in *Soames* v. *Martin* (3), that Vice-Chancellor *Wood's* decision in *Gardner* v. *Barker* was greatly influenced by what he supposed Lord *Camden* to have said in *Knapp* v. *Noyes* (4). It was, however, pointed out to me by Mr. *Graham Hastings* in the course of the argument, and I quite agree, that that was an entire fallacy. When Lord *Camden* said "maintenance and education are confined to minority," he was, as I consider, merely referring to the terms of the will then before him, being such that in that particular case they were so confined, and was not laying down any general rule that maintenance and education in such a clause or provision would ordinarily and *per se* determine with minority. I have thus pointed out what my view would be in such a case as the present if it were unaffected by authority, and I have also adverted to what appears to have been the mistake of Vice-Chancellor *Wood* as to the judgment of Lord *Camden*. Under these circumstances, and considering especially that there was a context in *Gardner* v. *Barker*, it appears to me that I am not bound by the decision in that case; and I think that the decision of the Vice-Chancellor of *England* in *Soames* v. *Martin* is a sound and good decision, more strictly applicable to the case before me, and therefore I adopt and follow that decision in this case.

There is, however, another point to be considered in this case, viz., whether or not there is in this codicil any context which should cause the Court to come to a determination different from that which it would arrive at in the ordinary case of a provision for

(1) 1 Russ. & My. 631.
(2) 18 Jur. 508.
(3) 10 Sim. 287.
(4) Amb. 661.

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maintenance; and it is said that the words, "and I have to request Mr. *William Grant*, banker at *Portsmouth*, to see it carried into execution," have this effect. It is argued that those words cut down that which would otherwise be an absolute gift, and limit it to minority; that this was a provision in the nature of a *quasi* guardianship of the children during a certain period, and that as such a guardianship would only be required during minority, the gift must be cut down to the period during which the guardianship was required. That is a very fair argument, but it is not sufficiently cogent to destroy what is otherwise the effect of the gift and provision for maintenance and education. The testator might very well appoint a person to see that the provision for the maintenance and education of these children was duly carried out, so long as they were not themselves, from not having attained their majorities, in a position to call for payment to themselves directly of their shares of this annuity. But I do not think that it was intended by these words to invest Mr. *Grant* with a power or right to say what children were to share, or to place the fund so far under his control as that he could apply the annuity for the sole benefit of some of the children to the exclusion of others. There is no right or power conferred upon him in that particular. I hold, therefore, that while the former words are clear enough to give the benefit to the children during their lives, these latter words are not sufficient to take away the effect of what without them would be plain, and to cut down the gift to one during minority only.

There are, I think, other cases having some bearing upon the subject which have not been referred to. I mean those in which the question has been discussed whether, when a trust is imposed upon a tenant for life for the maintenance of his children, that trust drops off as each child attains twenty-one. I think that the tendency of the authorities is to say that there is not that limitation of the trust, and that when there is a provision for children through the medium of an interest to a tenant for life by way of trust, the authorities favour the view that a child, though adult, is entitled to the benefit of the provision, so that if he is residing with his parent in the same house he is not to be turned out of doors immediately on attaining the age of twenty-one. It

is said that if a child leaves his parent's house, he might, under such a trust, cease to have the benefit; but even in that case, if the child, being a daughter, left the house for the purpose of being married, and afterwards became a widow and returned again, she might be entitled to share without reference to the question of her minority (1); so that those authorities rather take a broader view than one confining provisions of this kind merely to minority. The result is that the children continue entitled to the annuity during their lives and until the death of the survivor of them, and they take it for their lives and the lives and life of the survivors and survivor of them, the children entitled for the time being being entitled as joint tenants unless they sever the joint tenancy.

Solicitors: *W. H. Oliver; Williamson, Hill, & Co.*

(1) See *Scott* v. *Key*, 35 Beav. 291.

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[1878 T. 73.]

Mine—Trespass—Unauthorized Working—Bonâ fide Expectation of Title—Account—Allowances—Cost of Severance—Statute of Limitations (21 *Jac.* 1, *c.* 16, *s.* 3)*—Trustees—Notice—Evidence—Admissibility—Entry in Diary of Agent—Proof of posting of Letter—Costs—Offer by Defendant.*

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The owner of a mine commenced to work from his own mine into an adjoining mine vested in trustees, in the *bonâ fide* belief that he was about to obtain from them a contract authorizing him so to work, and gave to one of the trustees notice that he was about to commence working:—

Held, that the working, though no contract was afterwards entered into, and the trustees had no power to make one, ought to be treated on the same footing as if it had been commenced inadvertently, and in taking an account of the minerals gotten without authority the Defendant was allowed the cost of severing them, as well as the cost of bringing them to bank. But, from the time that notice was given to the Defendant that no contract would be made with him authorizing him to work, his working was treated as fraudulent, and he was allowed only the cost of bringing the minerals to bank.

So long as a wrongful working is to be treated as inadvertent the *Statute of Limitations* applies, and the account will only be directed for six years from the issue of the writ. But the *onus* is on the Defendant to shew that minerals gotten by him were gotten before the six years.

An entry in a diary kept by an agent is not admissible to prove a fact therein stated, unless it is shewn that it was the duty of the agent to make the whole entry.

A witness produced a copy of a letter which he said was made by him, and he swore that he should in the ordinary course of business have posted the original:—

Held, that this was evidence of the posting, and that, the original not being produced, the copy was good secondary evidence.

The solicitors of a Defendant wrote to the Plaintiff's solicitors that they were prepared to advise the Defendant to settle on certain terms:—

Held, that this was not such an offer as would free the Defendant from liability to the subsequent costs of the action, inasmuch as he might have refused to follow the advice of his solicitors.

THE Plaintiffs were *H. J. Trotter*, *G. D. Trotter*, *T. L. Trotter*, and *H. H. Trotter*, the trustees of the will of *William Trotter*, who died on the 6th of February, 1866. The first two Plaintiffs were original trustees of the will; the other two had been appointed subsequently under a power in the will. One of the original

trustees was *W. D. Trotter*, a son of the testator. He was a solicitor, and after the death of the testator he acted as a trustee and also as solicitor to the trustees. He and the other sons of the testator had, under the will, an option to purchase any part of his real estate at a valuation. The will gave the trustees no power to lease the coal under the trust property, or to sell it separately from the surface. *W. D. Trotter* died in the year 1875. Part of the trust property consisted of some closes of land in the county of *Durham*, adjoining to a colliery, called the *Woodhouse Close Colliery*. In the year 1871, and for some time afterwards, this colliery belonged to and was in the occupation of the Defendant, Sir *Charles Maclean*. Mr. *Richard Heckels* acted as viewer and manager of the colliery for him. *Heckels* died in February, 1877. The writ in the action was issued on the 20th of April, 1878. The statement of claim alleged that the Defendant while in possession of the colliery, without any license or authority, and without the knowledge of the trustees, or any of them, secretly and knowingly trespassed on the Plaintiffs' adjoining closes of land, and wrongfully worked by secret underground workings connected with the *Woodhouse Close Colliery*, and removed a quantity of coal from under the Plaintiffs' closes. It was alleged that none of the Plaintiffs, or of the trustees for the time being of the will, had any knowledge of the Defendant's working before the 22nd of January, 1877. The Plaintiffs claimed a declaration that the Defendant was chargeable to them in respect of all coals gotten by him under their closes of land; an inquiry what coals had been gotten or removed by the Defendant; an account of their value; and payment of the ascertained value to the Plaintiffs.

By his statement of defence the Defendant alleged that in October, 1871, an agreement for the purpose of working the coal under the Plaintiffs' closes of land was entered into between *W. D. Trotter*, as the solicitor and agent of the trustees, and on their behalf, and *Richard Heckels* on behalf of the Defendant; and that in pursuance of that agreement the coal was worked by the Defendant from October, 1871, until October, 1872. And the Defendant claimed the benefit of all statutes for the limitation of actions as a bar to the relief claimed by the Plaintiffs.

By the evidence adduced at the trial it appeared that in the

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year 1871 some negotiations took place between *W. D. Trotter* and *Heckels*, with the view to the granting to the Defendant of a license to work the trustees' coal. On the 28th of October, 1871, *Heckels* wrote to *W. D. Trotter* as follows:—

"After being with you yesterday morning when we arranged that your coal had to be worked at *Woodhouse Close Colliery*, Sir *C. Maclean* paying for it as worked at the rate of 18*s.* per ten, and also paying 2*s.* per ten on any coal he brings through your freehold, I wrote up to the colliery, and instructed the resident party in charge of the work to 'fire away' (drive) into it. I trust it may be all found in a workable condition, and you may rest assured that my best endeavours shall be used not to lose one inch of it."

After this the Plaintiffs' coal was worked on behalf of the Defendant *Maclean* until October, 1872, when he discontinued the working. On the 23rd of July, 1872, *W. D. Trotter* had written to *Heckels* as follows:—

"I find my father's trustees have no power to lease coal, and there are certain difficulties in the way which prevent myself and my brothers exercising our pre-emption clause just at present, so that I fear it is impossible for me to enter into terms for the lease or sale of the coal under my father's land, at any rate for the present."

On the 24th of July, 1872, *Heckels* replied as follows:—

"*Trotter's Coal.*

"Am I to understand you wish the working of this coal at the *Woodhouse Close Colliery* abandoned? I have caused money to be spent in getting into it, and to the present time but very little coal has been worked from the property."

W. D. Trotter replied on the 25th of July, 1872, as follows:—

"I really have no wish in the matter, but as things at present stand we have no power to sell or lease the coal, and I find it will involve such a large expense to obtain power, I doubt whether it is worth while. Probably the matter had better stand over till next we meet."

On the 5th of August, 1872, *Heckels* wrote to Mr. *Iliffe, Maclean's* solicitor, as follows:—

"I inclose you copies of letters from Mr. *Trotter*, dated 23rd and 25th ult., and my reply to the former. I am going on working this coal partially. I imagine Mr. *Trotter* does not object to my doing so. What is your advice in the matter?"

On the 7th of August Mr. *Iliffe* replied:—

"I am uncommonly sorry to find that there is a difficulty with regard to Mr. *Trotter's* coal. . . . I, however, concluded that Mr. *Trotter*, as a lawyer, would not have entered into the arrangement with you unless he had known that he could do so legally. I think you and Sir *Charles* have reason to complain that he did not know of his powers to conclude an agreement; but we are dealing with a gentleman who will not take improper advantage of the mistake. It does not appear that he objects to what has been done, though he thinks it best that matters should remain as they are. There can, I suppose, be no objection to your using the communication you have made through Mr. *Trotter's* coal to the shaft. This liberty was, I believe, one object you wished to acquire in working Mr. *Trotter's* coal, and as no injury can arise to the family, but pecuniary benefit in the way of rent, you will of course arrange for your enjoying this way of access, though you do not further work the coal."

North, Q.C., and *J. Rigby*, for the Plaintiffs:—

The Defendant has not proved the agreement with the trustees which he alleges. The *Statute of Limitations* only began to run when we discovered the unlawful acts, that is, in January, 1877. There was no laches on our part: *Ecclesiastical Commissioners for England* v. *North Eastern Railway Company* (1). In *Dean* v. *Thwaite* (2) there had been no fraud; the coal had been taken unintentionally. A man may secretly remove the coal from under his neighbour's land, who has no means of discovering what is being done. Surely the *Statute of Limitations* cannot apply to such a case. Secretly taking your neighbour's coal in itself amounts to fraud, though of course if it is taken in ignorance there is no

(1) 4 Ch. D. 845. (2) 21 Beav. 621.

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fraud. The limitation of six years may well apply in the one case, but not in the other. The principle of the *Statute of Limitations* is that there has been laches on the part of the person who is suing, and there can be no laches when that which is done is done underground where it cannot be discovered.

[FRY, J., referred to *Imperial Gas Company* v. *London Gas Company* (1) as shewing that fraud is not an answer to a plea of the statute.]

Ecclesiastical Commissioners for England v. *North Eastern Railway Company* (2) shews that the Defendant ought not to be allowed the cost of severing the coal. The other authorities on the subject were fully discussed in that case. It cannot be said that the Defendant worked the Plaintiffs' coal with a *bonâ fide* belief of a title to do so. The negotiations with *W. D. Trotter* never resulted in an agreement, and the trustees could not give the Defendant a title. The Defendant took his chance of getting a title. He is bound to shew a justification for his working; it is not enough to shew there was a probability that he might be justified.

[FRY, J:—In *Hilton* v. *Woods* (3) it was held that the defendant, who had worked the plaintiff's coal inadvertently, was only to pay the fair value of the coal as if he had purchased the mine.]

Inadvertently can only apply to a mistake of boundaries. In that case there was a *bonâ fide* belief of title. There could not be any such belief in the present case, at any rate after the letters of the 23rd and 25th of July, 1872. The principle of the decisions is that the true owner is entitled to the value of the coal as a chattel at the time when the trespasser began to take it away; that is, as soon as it existed as a chattel: *Martin* v. *Porter* (4). A Court of Equity is not bound by the *Statute of Limitations* in regard to a merely equitable right, though it may act by analogy to the statute. The equitable demand for compensation in an action like the present is quite a different thing from damages in an action of trespass.

[FRY, J.:—The measure of damage is the same.]

(1) 10 Ex. 39. 18 Jur. 197
(2) 4 Ch. D. 845.
(3) Law Rep. 4 Eq. 432.
(4) 5 M. & W. 351.

That is a mere accident. *Ex parte Adamson* (1) illustrates the difference between legal and equitable liability. There is no moral distinction between a wrongful taking of coal and any other theft, though there is a great distinction between taking the coal intentionally and by mistake. Even then the result would be the same to the real owner. In a Court of Equity the question is one of conscience. A reckless dealing with your neighbour's property, though by a mere technicality of law it is not larceny, yet in the view of a Court of Equity is equivalent to it. The *Statute of Limitations* does not apply, and the account ought to be taken during the whole period of the Defendant's working according to the harsher rule, not allowing him the cost of severing the coal.

Cookson, Q.C., and *W. S. Owen*, for the Defendant.

Mr. *Heckels*, jun., a nephew of Mr. *Richard Heckels*, who had assisted him in conducting the agency business of the Defendant, was called, and produced a diary which he said had been kept by his deceased uncle. He said that his uncle kept the book in a desk in his office.

Owen proposed to prove by means of an entry in this diary what took place at the interview between Mr. *Heckels* and Mr. *W. D. Trotter* on the 27th of October, 1871.

North, Q.C., objected.

Owen:—The entry is admissible as a declaration by a deceased person, it being made in the course of his business: *Taylor* on Evidence (2).

[FRY, J.:—According to what is laid down there I must be satisfied, not merely that the entry was made in the usual routine of business, but that it was the duty of Mr. *Heckels* to make the whole of it.]

It is the duty of a man of business to make such entries that he may be able to report to his principal.

(1) 8 Ch. D. 807. (2) 7th Ed. vol. 1. p. 599.

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North, Q.C.:—The evidence is inadmissible; there is nothing to shew that it was the duty of *Heckels* to do the particular thing to which the entry relates, and then to make a record of it: *Smith* v. *Blakey* (1).

Owen, in reply.

FRY, J.:—

I reject the evidence, on the ground that it is not shewn that there was any duty on the part of Mr. *Heckels* to make the entire entry.

The original of the letter of the 28th of October, 1871, not being produced by the Plaintiffs on notice, the Defendant's counsel proposed to prove it by means of a copy.

Mr. *Heckels*, jun., produced a copy of the letter which he said had been made by him at the time. He said also that, though he did not remember posting the letter, he had no doubt that he would have done so in the ordinary course of business.

North, Q.C.:—I object to the admission of the copy. We have no such document in our possession. It ought to be strictly proved that the letter was sent.

FRY, J.:—

It appears to me that there is some evidence of the posting of the letter, though it is weak. The witness says that in the ordinary course of business he would post the letter. I must, therefore, admit the copy.

Cookson, Q.C., and *W. S. Owen*, for the Defendant:—

It is clear from the letter of the 28th of October, 1871, that some agreement had been come to between *Heckels* and *W. D. Trotter*. The latter was himself one of the trustees, and was the solicitor of the trustees, and *Heckels* might well, and no doubt did, believe that he had power to bind his co-trustees. At any rate he acted in the *bonâ fide* belief that a lease would be granted by the

(1) Law Rep. 2 Q. B. 326.

trustees, under which the Defendant would acquire a good title to work the coal. There was nothing fraudulent or secret in what he did; there was only a mistake or inadvertence. No doubt a fraudulent concealment might prevent the *Statute of Limitations* from running, but there could be no fraud when the working was actually known to one of the trustees. No doubt in a Court of Equity the time only runs from the discovery of a fraud or mistake, or from the time when it might have been discovered, if reasonable diligence had been used: *Brooksbank* v. *Smith* (1); *Ecclesiastical Commissioners for England* v. *North Eastern Railway Company* (2); but here, as one of the trustees knew what was being done, the others might have discovered it if they had used reasonable diligence.

[FRY, J.:—In the latter case Vice-Chancellor *Malins* said (3) that "for the purposes of the statute, the breaking of bounds into your neighbour's colliery must be considered a fraudulent act."]

That *dictum* is not borne out by the other authorities. Fraud is not an answer to a plea of the *Statute of Limitations* at law: *Hunter* v. *Gibbons* (4).

[FRY, J.:—The question there was merely whether, under sect. 85 of the *Common Law Procedure Act*, 1854, fraud could be replied as an equitable answer to a plea of the statute.]

The nature of the jurisdiction of the Court of Chancery in mining cases is explained by Lord *Hardwicke* in *Jesus College* v. *Bloom* (5). It was part of the general jurisdiction in matters of account. But, though the Court of Chancery had jurisdiction in such cases, the taking of a neighbour's coal is not the less a trespass. In *Hunter* v. *Gibbons* (6) Baron *Alderson* says that there is no distinction between an underground trespass and a trespass on the surface. The reason for going to a Court of Equity was that it was difficult to satisfy a jury about underground workings; the quality of the act was the same. *Dean* v. *Thwaite* (7) shews that the statute applies when coal has been

(1) 2 Y. & C. (Ex.) 58.
(2) 4 Ch. D. 845.
(3) Ibid. 860.
(4) 1 H. & N. 459.
(5) 3 Atk. 262, 264.
(6) 1 H. & N. 465.
(7) 21 Beav. 621.

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taken unintentionally, and there has been no attempt to conceal the fact. Sect. 26 of the Act 3 & 4 Will. 4, c. 27, prescribes the time from which the statute runs in a case of concealed fraud. A Court of Equity is within the spirit and meaning of the *Statute of Limitations*, and acts in obedience, not merely by analogy to them: *Hovenden* v. *Lord Annesley* (1). The Defendant is entitled to the benefit of the statute.

Then, as to the footing on which the account is to be taken, the principle of the cases is this, that when the coal has been worked under a *bonâ fide* belief of title the Defendant is to have all just allowances, including the cost of severing the coal. That principle applies to the present case, where the Defendant commenced working the Plaintiffs' coal under a *bonâ fide* belief that he would obtain a license from them to do so, and gave their solicitor notice that he was about to commence working: *Hilton* v. *Woods* (2); *Jegon* v. *Vivian* (3); *Phillips* v. *Homfray* (4); *Llynvi Company* v. *Brogden* (5); *In re United Merthyr Collieries Company* (6); *Ashton* v. *Stock* (7); *Ecclesiastical Commissioners for England* v. *North Eastern Railway Company* (8). *Phillips* v. *Homfray* was a case of actual fraud. In the present instance that which is called in some of the cases the "milder rule of law" ought to be followed.

North, in reply:—

At any rate after the letter of the 23rd of July, 1872, the Defendant's working could not have been *bonâ fide*. The *Statute of Limitations* does not apply, for the Defendant did not begin working the coal inadvertently. He had nothing but an expectation that everything would be made right, and he deliberately took the risk of beginning before it was made right. It is not a sufficient excuse to say that one of the trustees had notice. The principle on which the cost of severance has been disallowed is that the act is a wrongful one, and a penalty ought to be inflicted on the wrongdoer. The Defendant knew when he began

(1) 2 Sch. & Lef. 607, 630.
(2) Law Rep. 4 Eq. 432.
(3) Ibid. 6 Ch. 742, 760.
(4) Ibid. 770.
(5) Law Rep. 11 Eq. 188.
(6) Ibid. 15 Eq. 46.
(7) 6 Ch. D. 719.
(8) 4 Ch. D. 845.

working that he had not acquired any title to do so. The cost of severance ought to be disallowed: *Martin* v. *Porter* (1); *Morgan* v. *Powell* (2); *Wood* v. *Morewood* (3). If this were an action at common law, it is not a case where the milder damages would have been given: *Phillips* v. *Homfray* (4); and the same rule should be applied here: *In re United Merthyr Collieries Company* (5). I ask the Court to follow, not to go beyond, the common law rule.

FRY, J., after stating the facts, continued:—

The first defence is this, that in October, 1871, an agreement was come to between the trustees and the Defendant for the leasing of the coal under the closes in question to him. If that agreement be proved he has a perfectly good defence to the action. The evidence in support of that contention consists mainly of a series of letters. In the first place there is the letter of the 28th of October, 1871, which, upon the evidence before me, I hold to have been written by the late Mr. *Richard Heckels*, who was then the viewer of the Defendant's colliery, and sent by him to Mr. *W. D. Trotter*, who was then one of the trustees and the solicitor of the trustees. That letter, however, does not appear to me to import the existence of an agreement. It undoubtedly imports that a conversation had taken place on the previous day between Mr. *Heckels* and Mr. *W. D. Trotter*, and that an understanding or arrangement had been then come to that Sir *Charles Maclean* should work the trustees' coal through his own workings, and should pay for it at a certain rate. But it does not appear to me that I can infer from that letter that there had been a bargain on Mr. *W. D. Trotter's* part that Sir *Charles Maclean* should have that right. It was rather the commencement of a negotiation, in which both parties so far had not differed as to the terms. On the evidence I come to the conclusion that Mr. *Heckels*, as well as Mr. *W. D. Trotter*, must have known that the trustees were necessary parties to any such bargain, and that no assent was ever given by any of the other trustees to the terms which

(1) 5 M. & W. 351.
(2) 3 Q. B. 278.
(3) 3 Q. B. 440, n.
(4) Law Rep. 6 Ch. 770.
(5) Law Rep. 15 Eq. 46.

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were mentioned in the conversation between Mr. *Heckels* and Mr. *W. D. Trotter*. That conclusion is, in my judgment, very strongly confirmed by the subsequent letters written in July, 1872, when Mr. *Heckels*, on being informed by Mr. *W. D. Trotter* that his father's trustees had no power to lease or sell the coal, did not for a moment suggest that any concluded bargain had been come to between them in the previous month of October. No doubt, payments were subsequently tendered of royalties on the footing of the alleged agreement. No payment, however, has ever been retained on the footing of the agreement, and, looking at the circumstances, it does not appear to me that they can work any estoppel against the Plaintiffs, and still less are they conclusive evidence of any bargain having been arrived at in October, 1871. Therefore, I come to the conclusion, as a matter of fact, that no bargain has been proved to have been made in that month. In fact the evidence goes to shew that there was no such bargain.

8 Q.B.D. 277

The next question which arises is with regard to the *Statute of Limitations*. The Defendant's workings began in November, 1871, and the six years before the issue of the writ began on the 20th of April, 1872. The question of the statute, therefore, applies only to the interval between November, 1871, and April, 1872. The statute 21 James 1, c. 16, s. 3, imposes the term of six years as the limitation in actions of trespass, and, although the present proceeding is a proceeding in a court of conscience, it is undoubtedly in respect of a trespass, and it appears to me that the period of limitation imposed by the statute of *James* ought to apply to proceedings in this Court in respect of a trespass, unless there be some equitable ground for repelling the application of the statute. Such an equitable ground has in many cases been found in fraud. When fraud or any other equitable circumstance exists, undoubtedly the statute will not apply.

Now were the entry and possession of the Defendant in the present case and his trespass fraudulent? In my view they were not. I think that, although no agreement is proved to have been come to between him and the trustees in October, 1871, it is proved that there was a negotiation then, and that there was on both sides the expectation that a bargain or agreement would be

arrived at, and, more than that, that there was knowledge in one of the trustees, which I must impute to them all, because it was his duty to communicate it to his fellow trustees, that immediately after the 28th of October, 1871, the coal under their land would be worked by the Defendant. With that knowledge on the part of the owners of the coal, I cannot, as it seems to me, without a violation of language, say that the Defendant's entry was fraudulent. The intention to enter was disclosed, and no one could read the letter of the 28th of October, 1871, which I believe Mr. *W. D. Trotter* to have seen, without knowing that very shortly after its date an entry would be made by the Defendant on the coal in which the trustees were interested.

It has not escaped my attention that in the letter of the 24th of July, 1872, Mr. *Heckels* represented that, up to that date, very little coal had been worked. I am not satisfied that that statement was a perfectly fair one, and I have doubted whether I ought not to consider that it made the previous entry fraudulent, because it was in effect a concealment of the extent to which the workings had been carried. But, looking at the vagueness of the terms of that letter, and bearing in mind it was not set up by the pleading that that letter was fraudulent, and that, therefore, the attention of the Defendant was not challenged to that point, I think I should be going too far if I were to decide that the trespass became fraudulent by virtue of the misrepresentation contained in that letter.

I find, therefore, no equitable circumstance which repels the application of the *Statute of Limitations,* and I hold that no account can be directed of the workings between the 5th of November, 1871, when they began, and the 20th of April, 1872, the commencement of the period of six years before the issue of the writ. But I shall apply the principle which Lord *Romilly* laid down in *Dean* v. *Thwaite* (1), and direct that, in ascertaining the amount of coal worked, all that has been worked shall be deemed to have been worked subsequently to the 20th of April, 1872, unless the Defendant can prove the contrary.

The next question is, what allowances are to be made to the Defendant in taking the account. Accounts in actions of this

(1) 21 Beav. 621.

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character in the Court of Chancery have been directed on two footings; sometimes an allowance for the cost of severance or getting the coal has been made, and sometimes it has not. In all cases an allowance has been made for the cost of bringing the coal to bank. In inquiring what allowances are to be made in the present case, a distinction must be drawn between the period from the 20th of April to the 23rd of July, 1872, and the period subsequently to the 23rd of July, 1872, because in that month of July a correspondence passed between the parties which seems to me to be of the highest moment in answering the question what allowances are to be made. On the 23rd of July Mr. *W. D. Trotter* distinctly informed Mr. *Heckels* that his father's trustees had no power to lease the coal, and that he could not enter upon any terms for the lease or sale of the coal; and again, on the 25th of July, he said that the trustees had no power to lease or sell the coal. It further appears that Mr. *Heckels*, on receiving these letters, was advised by the solicitor of his principal that he ought not to persist in taking any further coal; in other words, that any further taking of coal would be wrongful.

Now, what do the cases decide with regard to the severer or the milder rule? The cases are numerous, and I believe, with two or three exceptions, they have all been cited. The milder rule has been applied where the Courts have said that the defendant has acted inadvertently in taking the coal: that is the language of Vice-Chancellor *Malins* in *Hilton* v. *Woods* (1). Again, it has been applied where the Courts have said that the defendant has acted under a *bonâ fide* belief of title: of that *Hilton* v. *Woods*, *Jegon* v. *Vivian* (2), and *Ashton* v. *Stock* (3) are examples. It has been applied again when the Courts have said that the defendant has acted fairly and honestly: that was the language of Lord *Wensleydale* in *Wood* v. *Morewood* (4). It has been applied in cases of mere mistake: that is the language of Vice-Chancellor *Bacon* in *In re United Merthyr Collieries Company* (5). The harsher rule has been applied where the Courts have found fraud: of that there are numerous illustrations, one

(1) Law Rep. 4 Eq. 432.
(2) Ibid. 6 Ch. 742.
(3) 6 Ch. D. 719.
(4) 3 Q. B. 440, n.
(5) Law Rep. 15 Eq. 46.

being *Ecclesiastical Commissioners for England* v. *North Eastern Railway Company* (1). It has been applied where there has been negligence: that was the language of Lord *Wensleydale* in *Wood* v. *Morewood* (2). It has been applied when the act of the defendant has been said to be wilful, as in *Martin* v. *Porter* (3). It has been applied where the Court has said that the defendant has acted in a manner wholly unauthorized and unlawful, which was the language of Vice-Chancellor *Bacon* in *Llynvi Company* v. *Brogden* (4), and it was applied by Vice-Chancellor *Malins* in *Ecclesiastical Commissioners for England* v. *North Eastern Railway Company*, where he thought the workings were the result of a mistake. But I find no case which throws any direct light on the question whether the harsher or the milder rule should be applied where there has been the *bonâ fide* expectation of a contract, and where there has been a knowledge on the part of the owner of the coal that that expectation would be immediately acted upon by an entry upon the property. But the observations of Lord *Hatherley* in *Jegon* v. *Vivian* (5) seem to me to throw light upon the way in which I ought to answer the inquiry in the present case. He said, "I think that the milder rule of law is certainly that which ought to guide this Court, subject to any case made of a special character which would induce the Court to swerve from it; otherwise, on the one hand, a trespass might be committed with impunity if the rule *in pœnam* were not insisted upon; so, on the other hand, persons might stand by and see their coal worked, being spared the expense of winning and getting it." Those observations are very material in two ways. In the first place, they express the view of the Lord Chancellor that the milder rule is to be assumed when the propriety of applying the contrary rule is not shewn, and they throw the burthen on him who asserts that the severer rule ought to be applied; and so his language has been interpreted by Vice-Chancellor *Bacon* in, I think, more than one case. In the next place, Lord *Hatherley* points out that the milder rule should be applied where persons stand by and see their coal worked. Now, it does appear to me that in the present case

(1) 4 Ch. D. 845.
(2) 3 Q. B. 440, n.
(3) 5 M. & W. 351.
(4) Law Rep. 11 Eq. 188.
(5) Law Rep. 6 Ch. 762.

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one of the trustees knew as long ago as October, 1871, that the coal would be worked by the Defendant immediately after that date, and that he did not interfere in any way to stop it, and that his acquiescence must be deemed to have been the acquiescence of all, because there was a duty upon him to communicate to his co-trustees anything which required that they should take proceedings for the purpose of protecting the trust property. I therefore hold that, in respect of the interval between April and July, 1872, the milder rule must be applied.

But after the 23rd of July, 1872, the Defendant, through his agent, knew that he had no right to expect a contract with the trustees, or to expect any title to the coal. He knew, therefore, that any subsequent working by him would be wholly unlawful and unauthorized; it would be simply wilful; and yet his agent continued to work the coal. It appears to me, therefore, that all the workings subsequent to the 23rd of July, 1872, were of the wilful description which I have mentioned, and that, according to the cases, the severer rule should be applied to them.

One other question only remains for decision. On the 6th of May, 1879, the Defendant's solicitors wrote to the Plaintiffs, saying that they were prepared to advise Sir *Charles Maclean* to settle on certain terms. It is said that that was a proper offer, and that the costs of the action ought not to be given after that date. In my view it was not a proper offer. It was a mere statement of what they were prepared to advise their client to do, and their client might refuse to act on it. When defendants desire to stay their liability to costs in an action, they must make a clear, unconditional offer, equivalent to the whole right of the plaintiff at the time.

Solicitors for Plaintiffs: *J. Crowdy & Son*, agents for *Trotter, Bruce, & Trotter, Bishop Auckland.*

Solicitors for Defendant: *Iliffe, Russell, Iliffe, & Cardale.*

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Dec. 12, 13.

Vendor and Purchaser—Specific Performance—Notice to make Time of Essence of Contract—Validity—Reasonableness—Pleading—Counter-claim—Reply—Admission—Specific Denial—Amendment—Evidence—Costs—Rules of Court, 1875, *Order* XIX., *rr.* 3, 17, 20, 22.

When time is not originally made of the essence of a contract for the sale of land one of the parties is not entitled afterwards by notice to make it of the essence, unless there has been some default or unreasonable delay by the other party.

After a delay of two years on the part of a vendor, he gave notice to the purchaser to complete his contract within three weeks, and that, if he did not do so, the vendor would treat the contract as at an end:—

Held, that the time limited for completion was, under the circumstances, unreasonably short, and the notice therefore of no effect.

The Defendant to an action delivered a statement of defence and counter-claim. The defence contained various admissions and allegations of fact, and then, by way of counter-claim, the Defendant repeated "the several matters hereinbefore stated and admitted," and claimed certain relief. The Plaintiff, by his reply, after making certain admissions and joining issue on the rest of the statement of defence, "in reply to the statements alleged by way of counter-claim" repeated "the several matters stated in the statement of claim and the admissions hereinbefore made," and said that, "save as stated in the statement of claim or hereinbefore admitted, each of such allegations is untrue:"—

Held, that this amounted to an admission of all the statements alleged by way of counter-claim.

But leave to amend was given.

The issues of fact on the claim and the counter-claim being identical:—

Held, that the Plaintiff was not entitled to adduce fresh evidence in reply on the counter-claim.

A vendor brought an action claiming a declaration that his contract for sale was at an end. The purchaser made a counter-claim for the specific performance of the contract. Judgment was given for the Defendant, with costs, on both claim and counter-claim:—

Held, that the Defendant was entitled to deduct his costs from his purchase-money in priority to a mortgagee of the Plaintiff, whose mortgage had been created after the contract for sale, but before the commencement of the action.

ON the 30th of May, 1870, *J. S. Bell* entered into an agreement with *W. Green* to grant him a lease of some property in the parish

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of *Bromley, St. Leonard's*, for a term of ninety-nine years from the 25th of March, 1870.

By an indenture dated the 29th of June, 1870, *Green* covenanted with *H. J. Farrar* and *J. A. Philpott* to obtain a lease pursuant to the agreement of the 30th of May, 1870, and to mortgage the same, when obtained, to them to secure £1500 advanced by them to him, with interest.

On the 17th of March, 1871, *Green* executed a further charge on the property in favour of *Farrar* and *Philpott*, to secure certain costs, charges, and expenses.

By an indenture dated the 10th of August, 1871, *Green* further charged the property with the payment of all sums of money which should be paid by *Farrar* and *Philpott* in the completion of buildings upon the property included in the mortgage.

By an indenture dated the 6th of December, 1871, *Bell*, in pursuance of his agreement, demised the property to *Green* for the term of ninety-nine years from the 25th of March, 1870.

On the 2nd of February, 1875, *Green* further charged his interest in the property to secure to *Farrar* and *Philpott* the payment of £55 9*s.* 6*d.*, with interest.

By an indenture dated the 24th of March, 1875, *Green* demised the property comprised in the lease of the 6th of December, 1871, together with a factory thereon erected, to *Charles Sevin*, for the term of ninety-nine years from the 25th of March, 1870, except the last ten days of the term, at a rent gradually increasing to a maximum of £500 per annum, which maximum was to come into operation from the 29th of September, 1874. *Farrar* and *Philpott* joined in granting this lease.

This lease contained a clause providing that *Sevin* should have the option, at any time during the first seven years of the term thereby created, of purchasing the whole of the demised premises, and the lease from the superior landlord to *Green*, for £5000.

On the 15th of March, 1877, *Sevin* served on *Green* a notice in writing, declaring his option of forthwith purchasing the whole of the demised premises, and the lease from the superior landlord, at £5000, and agreeing to complete the purchase accordingly. A similar notice was also served on *Farrar* and *Philpott*.

On the 20th of March, 1877, *Green's* solicitor sent an abstract

of his title to the property to *Sevin's* solicitor, and on the 23rd of March he informed him that the title deeds could be examined at any time at the office of the *London* agent of *Farrar* and *Philpott*. The abstract did not disclose the charge of the 17th of March, 1871, in favour of *Farrar* and *Philpott*. On the 29th of March, 1877, *Sevin's* solicitor sent to *Green's* solicitor a draft assignment of the lease to *Sevin*. The completion of the contract was delayed in consequence of a dispute which arose between *Green* and *Farrar* and *Philpott* as to the amount secured by their mortgage and other charges on the property, which resulted in the bringing of an action of *Farrar* v. *Green* in the Chancery Division; and the draft assignment remained in the hands of *Green's* solicitors until the 25th of March, 1879. On the 6th of March, 1878, *Sevin's* solicitor wrote to *Green's* solicitors asking when *Green* would be able to complete the purchase. On the 16th of March, 1878, they replied, "We have been trying to settle the suit with Messrs. *Farrar*, but have not succeeded. If you like to pay the money into Court or deposit it in a bank in the joint names of Messrs. *Farrar's* solicitor and ourselves the matter can, we think, be completed." No further communication was made by *Green* or his solicitor to *Sevin* or his solicitor until the 25th of March, 1879, when they returned the draft assignment with various alterations in it. With it they sent a supplemental abstract of a mortgage of the property, dated the 20th of November, 1877, which *Green* had executed in favour of *Harriet Lidiard* and *F. S. Lidiard*. The draft assignment as altered contained a recital of this mortgage and also a recital of the charge of the 17th of March, 1871, of which *Sevin's* solicitor had not previously heard. There were also recitals of the amounts due to *Philpott* (*Farrar* being then dead) and the *Lidiards* respectively, but the sums due were left in blank. In the margin, opposite to the recital of the amount due to *Philpott*, was the following note by his solicitor:—

"This should include the costs of the Plaintiffs. I suppose the other parties wish this deed to be executed before the amount of the taxed costs can be ascertained. If so, I must see that a sufficient sum is set aside and secured out of the purchase-money to meet these costs, and this recital will require some modification."

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As a matter of fact when the draft assignment was returned an arrangement had been made as to the payment of the costs referred to in the note.

With the draft assignment and supplemental abstract *Green's* solicitor wrote a letter saying that the instrument abstracted could be seen at his office at any time, and that, as soon as the day was fixed, the accounts could be made up and the sums due to the mortgagees inserted in the deed.

On the 1st of April, 1879, *Green's* solicitor called at the office of *Sevin's* solicitor, but did not see him. The same day *Sevin's* solicitor wrote to *Green's* solicitor:—

"I am sorry I did not see you this morning, as I should have explained to you that you have come down upon me all of a sudden after two years' silence. I had no idea how near to arrangement you were with Mr. *Farrar*. In fact, I have heard nothing whatever about the matter for so long that I had almost forgotten it. It so happens that I am now so very busy that I hardly know which way to turn, but I will look into the matter in a day or two and write to you again."

On the 3rd of April *Green's* solicitor wrote to *Sevin's* solicitor as follows:—

"I have received your letter of yesterday. All the conveying parties are ready to complete the sale, and I am instructed to give your client through you notice that he must complete his purchase at once, and if it is not completed before the 22nd inst. (that is, four weeks after the return of the draft to you) Mr. *Green* will seek to put an end to the contract, and to obtain such further relief as he may be entitled to."

During the whole of the time which had elapsed since *Sevin's* notice to exercise his option to purchase he had remained in possession of the property, and had paid interest on the purchase-money to *Farrar* and *Philpott*.

The purchase was not completed on the 22nd of April, and on the 23rd of April *Green* issued the writ in the present action against *Sevin* and *Philpott*.

By his statement of claim he asked for a declaration that the option of purchase given to *Sevin* by the lease of the 24th of

March, 1875, had not been and could not now be exercised, and that the notice of the 15th of March, 1877, was now of no effect, and that the contract (if any) which existed between the Plaintiff, either alone or jointly with any other persons, and *Sevin*, for the purchase by him of the premises comprised in the lease, had now been duly determined. The Plaintiff also claimed from *Sevin* two years' rent of the premises, and damages for his having given notice of his intention to exercise his option of purchase, and having failed to do so.

Sevin delivered a statement of defence and counter-claim. The defence consisted of thirty-three paragraphs, containing a number of statements of fact and some admissions. The counter-claim commenced thus:—"And by way of counter-claim this Defendant repeats the several matters hereinbefore stated and admitted, and claims as follows." And the claim was for the specific performance by the Plaintiff and the Defendant *Philpott* of the agreement for the sale of the premises to *Sevin*, in accordance with the option exercised by him, he offering specifically to perform the agreement on his part.

The Plaintiff delivered a reply by which he admitted the first five paragraphs of *Sevin's* statement of defence, and joined issue "upon the several defences, save as aforesaid, and save in so far as the same do not admit the statement of claim." "And, in reply to the statements alleged by way of counter-claim by the Defendant *Charles Sevin*, the Plaintiff repeats the several matters stated in the statement of claim and the admissions hereinbefore made, and says that, save as stated in the statement of claim or hereinbefore admitted, each of such allegations is untrue."

Sevin delivered a rejoinder to the reply, by which he joined issue upon the Plaintiff's reply to the counter-claim.

This was the trial of the action.

Cookson, Q.C., and *T. L. Wilkinson*, for the Plaintiff:—

Under the circumstances the Plaintiff was justified in giving the notice to complete the purchase by the 22nd of April.

[FRY, J.:—Has the Court ever allowed one party to a contract to make time of its essence by a notice given after the contract has been entered into, unless there has been unreasonable delay

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on the part of the person to whom the notice is given? *Taylor* v. *Brown* (1).]

There have been cases of the kind where there has been no previous unreasonable delay: *Dart's* Vendors and Purchasers (2); *Nott* v. *Riccard* (3); *Macbryde* v. *Weekes* (4).

[FRY, J.:—There the contract related to mining property, from the very nature of which time was of the essence.]

Mutual delay may be a sufficient ground for giving such a notice. The Defendant *Sevin* would not accept reasonable terms which were offered by the Plaintiff, though he could not be compelled to accept them. The time fixed by the Plaintiff's notice was reasonable, looking at what remained to be done.

[FRY, J.:—It seems to me that it would be a great enlargement of the jurisdiction of the Court to make a declaration that the contract is one of which there cannot be specific performance.]

In *Hudson* v. *Temple* (5) relief of that kind was given. The Court is in the habit of removing a cloud on a title: *Luke* v. *South Kensington Hotel Company* (6). Another purchaser might object to the existence of this contract. It must be mentioned on the abstract of title, and a purchaser might refuse to buy a Chancery suit. If the contract was not mentioned the purchaser would inquire whether the option of purchase given by the lease had been exercised. The reply would be that it had, and the vendor would then have to state his notice to rescind the contract.

North, Q.C., for the Defendant *Sevin*:—

The Plaintiff by his reply has admitted the statements contained in the statement of defence; there is no specific denial of them: Rules of Court, 1875, Order XIX, rr. 17, 20, 22.

Cookson, Q.C., for the Plaintiff:—

A denial of each of the allegations of the counter-claim is a specific denial of each.

(1) 2 Beav. 180.
(2) 5th Ed. p. 422.
(3) 22 Beav. 307.
(4) 22 Beav. 533.
(5) 29 Beav. 536.
(6) 7 Ch. D. 780.

FRY, J.:—I do not think it is. The object of the rule is to ascertain the point of the denial. The allegations may be complicated.

Cookson:—Even if the whole of the allegations are admitted, the conclusion that the Defendant is entitled to specific performance of the contract is not admitted. At any rate there has been a mere slip, and leave to amend ought to be given.

North, Q.C., for the Defendant *Sevin*:—

There is no ground for allowing an amendment. The rules are very plain, and so is the construction which has been put upon them: *Crowe* v. *Barnicot* (1).

[FRY, J.:—In *Tildesley* v. *Harper* (2) I refused leave to amend, on the ground that, if one party chose to come to trial with admissions of this kind on his pleading, the other party was entitled to the benefit of the admissions. But the Court of Appeal (3) took a different view, and held that the practice ought to be the same as it has been upon applications in Chambers to amend before trial.]

[*Rutter* v. *Tregent* (4) was also cited.]

FRY, J.:—

I think that an amendment ought to be allowed, and for this reason, that there has been no surprise. Both sides knew what the case was. The counter-claim was drawn in a mode which threw an unnecessary difficulty in the Plaintiff's way. The Defendant has pitchforked into his counter-claim all the statements contained in his defence. This may or may not be an admissible mode of pleading, but it throws on the Plaintiff the obligation of a very detailed pleading of possibly a very unnecessary character. The Plaintiff will have to take every statement and say whether he denies it or not. He must state what point he denies, and not merely deny the proposition generally.

Cookson then stated the amendments which he desired to make, and the argument proceeded.

(1) 6 Ch. D. 753.
(2) 7 Ch. D. 403.
(3) 10 Ch. D. 393.
(4) 12 Ch. D. 758.

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North, Q.C., and *Maidlow*, for the Defendant *Sevin*:—

After the Plaintiff's own delay this is a ridiculous action. The Plaintiff had no right to give the notice. The action must fail, and the Defendant is clearly entitled to the specific performance which he asks by his counter-claim. One party to a contract is not entitled to alter it or to put an end to it, unless there has been some default by the other party. There has been no delay or default on *Sevin's* part. In all the cases where one party to a contract has been allowed to make time of its essence when it was not so originally, there has been some default on the other side: *Reynolds* v. *Nelson* (1); *Taylor* v. *Brown* (2); *King* v. *Wilson* (3); *Wells* v. *Maxwell* (4); *Sugden's* Vendors and Purchasers (5).

But, if there was a right to give the notice, the time limited by it was unreasonably short. After two years' delay by the Plaintiff, eighteen days was too short to allow the purchaser to find his purchase-money. It should be taken into account that the Easter Vacation covered part of the time limited by the notice: *Crawford* v. *Toogood* (6). In *Pegg* v. *Wisden* (7) six weeks was held to be too short a time.

Fischer, Q.C., and *Procter*, for the Defendant *Philpott*.

Cookson, in reply:—

Though I may fail in my action, it does not follow that the Defendant must succeed in his counter-claim. Specific performance is a matter within the discretion of the Court: *Gee* v. *Pearse* (8). There was every reason why the Defendant should use expedition, for he knew that the Plaintiff had expended nearly £7000 on a property which the Defendant was to acquire for £5000. I propose to call witnesses to prove this expenditure and the Defendant's knowledge of it.

North, Q.C., for the Defendant *Sevin*, objected:—

The Plaintiff is not entitled to call any witnesses now. The facts in issue on the action and on the counter-claim are precisely

(1) 6 Madd. 18.
(2) 2 Beav. 180.
(3) 6 Beav. 124.
(4) 33 L. J. (Ch.) 44.
(5) 13th Ed. p. 227.
(6) *Ante*, p. 153.
(7) 16 Beav. 239.
(8) 2 De G. & Sm. 325, 346.

the same; the counter-claim raises no new issue of fact. It merely embodies the facts stated in the defence, and in his reply the Plaintiff only puts those facts in issue. The witnesses should have been called in the Plaintiff's opening of his claim, or, if necessary, he might have asked leave to put in rebutting evidence. He is too late now.

Cookson, Q.C., for the Plaintiff:—

A counter-claim has the effect of a cross action: Order XIX., r. 3. It is not opened till the original Plaintiff's case has been closed. The one action is not necessarily governed by the other. The delay which may be pleaded as an answer to a claim for specific performance need not be such as would afford ground for a rescission of the contract. The counter-claim is not a mere negative to the claim; it asks for positive relief.

FRY, J.:—

In the present case it appears to me that I ought not to admit fresh evidence at this stage of the proceedings. All the issues of fact on the claim and on the counter-claim are the same; I am not able to find one which is different. The evidence on the claim has been closed, and I think I should be doing wrong if I were now to allow fresh evidence to be adduced. It is said that there are facts which are material on the question of delay, but, if so, they would have been material with reference to the Plaintiff's notice to rescind. I should be creating a very inconvenient precedent if I were to admit new evidence now, when the whole case has been gone into in the Plaintiff's opening. Without saying anything about cases in which the issues on the counter-claim are different from those on the claim, I refuse to allow fresh evidence on the ground which I have already mentioned, that in the present case the issues on the claim and on the counter-claim are identical.

Cookson, Q.C., for the Plaintiff:—

The Defendant has not shewn, as he was bound to do, that he was ready to complete his contract.

FRY, J., after stating the nature of the claim made in the action, the provisions of the lease to the Plaintiff, and the notic

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of the 15th of March, 1877, and observing that the relations between the Plaintiff and his mortgagees were rather complicated at the time when the lease was granted to him, continued:—

There is no doubt that the effect of the notice of the 15th of March was to constitute a contract, between *Green* on the one hand and the Defendant *Sevin* on the other, for the purchase of the property at £5000. *Sevin* has since paid interest on that £5000, and it appears to me that, under the circumstances which are in evidence, he has remained in possession of the property in the character of a purchaser under that notice.

When the contract had been so constituted, difficulties arose about carrying it into effect in consequence of the complications which existed between *Green* and his mortgagees. No doubt as early as March, 1877, an abstract had been furnished to *Sevin*, and he had been informed that the deeds might be seen. It does not appear that they were investigated by him, but on the 29th of March, 1877, he sent a draft assignment of the lease to the vendor's solicitors. By reason of the complications to which I have referred, that draft remained in the hands of the vendor's solicitors from the 29th of March, 1877, to the 25th of March, 1879. But meanwhile, in March, 1878, *Sevin* had applied to *Green's* solicitors to know when they were likely to complete, an inquiry which, as it seems to me, ought to have been answered, if *Green* desired to drive *Sevin* to a very immediate performance of the contract after this delay. The inquiry, however, was never replied to in any other way than by a suggestion that *Sevin* should pay his purchase-money into Court to a joint account. No indication was given, perhaps none could be, as to when it was likely that the questions between the vendor and his mortgagees would be settled so as to enable them to concur in the assignment. The assignment was returned to *Sevin's* solicitor, as I have said, on the 25th of March, 1879, and with it was furnished a supplemental abstract of a new charge for £400 which had been created by the Plaintiff in favour of some mortgagees of the name of *Lidiard*. On the 1st of April Mr. *Dollman*, the solicitor of *Sevin*, wrote to *Green's* solicitors suggesting that he should have some further delay given to him. He said he was very busy then, and, to use his own words, they had "come down upon him all of

a sudden after two years' silence." That was met in this way. On the 3rd of April *Green's* solicitors wrote to Mr. *Dollman* in these terms:—[His Lordship read the letter of the 3rd of April, 1879.]

It is to be observed that the contract for purchase had limited no time for completion, and that, therefore, according to the rule in this country, each party was entitled to a reasonable time for doing the various acts which he had to do. What right then had one party to limit a particular time within which an act was to be done by the other? It appears to me that he had no right so to do, unless there had been such delay on the part of the other contracting party as to render it fair that, if steps were not immediately taken to complete, the person giving the notice should be relieved from his contract. It has been argued that there is a right in either party to a contract by notice so to engraft time as to make it of the essence of the contract where it has not originally been of the essence, independently of delay on the part of him to whom the notice is given. In my view there is no such right. It is plain upon principle, as it appears to me, that there can be no such right. That which is not of the essence of the original contract is not to be made so by the volition of one of the parties, unless the other has done something which gives a right to the other to make it so. You cannot make a new contract at the will of one of the contracting parties. There must have been such improper conduct on the part of the other as to justify the rescission of the contract *sub modo*, that is, if a reasonable notice be not complied with. That this is the law appears to me abundantly plain. One of the earliest cases on this doctrine of engrafting time by notice is *Taylor* v. *Brown* (1), and there Lord *Langdale*, the then Master of the Rolls, expressed his view in this way (2): "Where the contract and the circumstances are such that time is not in this Court considered to be of the essence of the contract—in such case, if any unnecessary delay is created by one party, the other has a right to limit a reasonable time within which the contract shall be perfected by the other." So in *King* v. *Wilson* (3), the same Master of the Rolls laid down

(1) 2 Beav. 180. (2) 2 Beav. 183.
(3) 6 Beav. 124.

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the principle in these words (1): "Though time may not be of the essence of a contract, yet where there is great and improper delay on one side, the other party has a right to fix a reasonable time within which the contract is to be completed." So again, in *Pegg* v. *Wisden* (2), Sir *John Romilly* said (3): "I concur also in the decisions, that where time is not originally of the essence of the contract, it may, in the case of improper delay, be made so by notice." And Lord Justice *Knight Bruce*, in *Wells* v. *Maxwell* (4), expressed himself in these characteristic words (5): "Now, whatever the form of the contract, if there had been in this case, on the part of the sellers, gross or vexatious or unreasonable delay, or delay not in conformity with the laws of necessity with regard to an English title in the present state of English law upon this subject, there might have been ground for the purchaser to insist upon being delivered from his contract." And, lastly, Lord *St. Leonards*, in his work upon Vendors and Purchasers (6), expresses the doctrine in these terms: "Where time is not made of the essence of a contract by the contract itself, although a day for performing it is named, of course neither party can strictly make it so after the contract; but, if either party is guilty of delay, a distinct written notice by the other, that he shall consider the contract at an end if it be not completed within a reasonable time to be named, would be treated in equity as binding on the party to whom it is given." In my judgment, therefore, the law of the Court is perfectly clear.

Then I ask myself, had there been on the 3rd of April any unreasonable delay on the part of the Defendant *Sevin*, to whom this notice was given? As I have already pointed out, he had sent the draft assignment to the vendor's solicitors two years before it was returned, and within a week or a little more of its being returned he was told that, if he did not complete within eighteen days, the contract would be at an end, and that in a case in which no answer had been given to his inquiry in March, 1878, how soon the contract was likely to be completed, so that he might have his purchase-money ready. It appears to me that

(1) 6 Beev. 126.
(2) 16 Beav. 239.
(3) Ibid. 244.
(4) 33 L. J. (Ch.) 44.
(5) Ibid. 50.
(6) 13th Ed. p. 227.

there was no delay on the part of Mr. *Sevin* which justified the giving of the notice, and if so, the notice clearly fails.

But assuming that I am wrong in this view, and that there was such delay as to justify the giving of the notice, there remains the important inquiry whether the time limited for completion by the notice was reasonable, having regard to all the circumstances of the case. In my opinion it was not. The great delay which had taken place—I do not say improperly—but which took place of necessity on the vendor's part, would render it justifiable for the purchaser to invest his purchase-money in such a way as to make it less accessible than if this long delay had not taken place. Three weeks, therefore, as it seems to me, was a somewhat short time even for raising the purchase-money under the circumstances. But it must also be borne in mind that the vendor had not even then done everything on his part. When his solicitors returned the draft assignment they sent with it a fresh supplemental abstract, and that of course required to be looked into. I say nothing about the verification of the deeds of which an abstract had been furnished so long before, because I think that probably the purchaser might have been required to verify them at an earlier date; but he had had no opportunity of verifying the new deed. No doubt that would require some, although not a long, time. Further than that, the deed of assignment had to be engrossed, and it is to be borne in mind that the draft was not sent in a condition in which it could be engrossed, because, through the carelessness of the vendor's solicitors a note had been left in the margin which shewed that further negotiation and arrangement had to take place with the mortgagees before it could be ascertained finally what form the draft would assume. It appears that as matter of fact an arrangement had been come to before the draft was sent, but it was sent in a form which left the question open. Although it might not have taken a long time to inquire of the vendor what the arrangement was, still this is not a matter to be passed over. I hold, therefore, that, looking at the previous long delay on the part of the vendor, he was not justified in limiting the time of completion to so short an interval as is mentioned in the notice. I confess that it was somewhat to my surprise that Mr. *Cookson* in his reply was pleased to reveal the true motive

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for which this notice was given, and that it was not given really for the purpose of expediting or bringing to a reasonable conclusion the contract pending between the parties, but for the purpose of getting out of the contract which the Plaintiff thought was not a judicious one. Mr. *Cookson* told me that Mr. *Green* had expended £6680 upon the property, while under this contract he was to get only £5000 for it, whereas, if the purchase went off, he would be left as the reversioner expectant on a lease which secured him interest at the rate of upwards of 5 per cent. upon his outlay. The object, therefore, thus disclosed was to squeeze Mr. *Sevin* out of his bargain. This does not appear to me to be an object to which the Court ought to lend its assistance. But, independently of that ground, I have come to the conclusion that the notice is not valid for the two reasons which I mentioned.

I think it is a matter of course to declare on the counter-claim that Mr. *Sevin* is entitled to specific performance of the contract. I therefore dismiss the original action with costs, and I give Mr. *Sevin*, the vendor's title being admitted, the costs of his counter-claim. There will be a reference to Chambers to settle the assignment in case the parties should differ, and general liberty to apply will be reserved.

North, Q.C., asked that the Defendant might be at liberty to deduct his costs both of claim and counter-claim from his purchase-money, according to the form of order given in *Seton* on Decrees (1).

FRY, J.:—I will make the order in that form, but it must be subject to the rights of the Defendant *Philpott* in respect of his mortgages. The mortgage to the *Lidiards* was made after the contract with *Sevin*, and cannot, therefore, affect his rights.

Solicitors for Plaintiff: *J. Lidiard & Co.*
Solicitor for Defendant *Sevin*: *F. Dollman.*
Solicitor for Defendant *Philpott*: *W. Elgood.*

(1) 4th Ed. vol. ii. p. 1304.

Ex parte HARRISON. *In re* HARRISON.

C. J. B.
1880
Jan. 12.

Court of Bankruptcy—Jurisdiction—Impeachment of Deed on Ground of Intention to defeat Creditors—Time for taking Objection—Bankruptcy Act, 1869, *s.* 72.

A mortgage given by a bankrupt more than twelve months prior to the bankruptcy was impeached by the trustee in the bankruptcy on the ground of its having been executed with intent to defeat creditors. Trial of issues was ordered by a County Court in an action in which the trustee was Plaintiff, and the mortgagee Defendant; and the jury found for the Plaintiff.

The Registrar of the County Court having made an order in the bankruptcy that the instruments be delivered up to be cancelled:—

Held, on appeal, that the trustee had no right to have the question tried in bankruptcy, and that the whole proceeding had been irregular.

Appeal allowed, but, as it did not appear that objection to the jurisdiction was taken in the Court below, without costs.

Revd on appl 14 CLD 165.

THIS was an appeal from an order of the County Court at *Hanley*.

By a memorandum of deposit dated the 30th of April, 1873, the bankrupt, *Titus George Harrison* the elder, of *Bucknall*, in the county of *Stafford*, declared that he had that day deposited with his son, the Appellant, *Titus George Harrison* the younger, of the same place, an indenture of conveyance, dated the 8th of December, 1860, of certain lands in the parish of *Stoke-on-Trent*, *Staffordshire*, which the depositor had recently purchased, and on which he had built a house and premises, in order to secure to the Appellant repayment of a sum of £385 and interest at £3 10*s.* per cent., being the aggregate of various sums of money alleged to have been lent to the depositor by the Appellant; and by a deed of mortgage dated the 8th day of May, 1873, in consideration of another sum of £395 alleged to have been lent and advanced by the Appellant to his father, the same piece or parcel of land, dwelling-house and premises, together with two adjoining plots of ground used as gardens, were granted by the mortgagor to the Appellant by way of mortgage, to secure repayment of the said sum of £395 and interest at £5 per cent.

Shortly afterwards, *Harrison* the elder became involved in a litigation, in which he failed, and on the 16th of June, 1874, he was adjudicated a bankrupt.

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Various examinations of the bankrupt took place, and at length, but not until the 27th day of November, 1878, a motion was made on behalf of *Charles Butters*, the trustee in the bankruptcy, for an order setting aside the deeds, and upon that day an order was made by the County Court directing the trial by a jury of certain issues in an action in which *Butters*, the trustee, was plaintiff, and the Appellant *Harrison* the younger was defendant, which were in effect as follows: whether the agreement of the 30th of April, 1873, and the mortgage of the 8th of May, 1873, were executed by the bankrupt in good faith and for valuable consideration, or whether they were executed fraudulently and without the consideration, or the whole of the consideration, therein stated, and with intent to delay or defraud creditors.

On the 20th day of June, 1879, trial of the issues was held at *Hanley* before Mr. *Selfe*, as deputy to the County Court Judge, and the jury gave a verdict for the plaintiff, finding that the instruments were executed by fraudulent collusion between father and son.

On the 26th of June a summons was served on the Appellant to produce the instruments to be cancelled, and about the same date the trustee was served with notice that a new trial would be moved for.

On the 10th of July the Registrar of the County Court made the order now appealed from, which was to the effect that the instruments be, and the same were thereby set aside, and declared to be void and of no effect; and that the Appellant be ordered to deliver them up to be cancelled.

The application for a new trial was made before the Deputy Judge, and on the 5th of August he refused to grant the application on grounds which he stated in writing, but no order had been drawn up.

There was some conflict of evidence as to whether, at the trial, the examinations of the bankrupt and of the Defendant *Harrison* the younger were put in evidence; but the affidavit of the solicitor in support of the appeal did not state, nor did the Judge's notes mention, that on the occasion of the application for a new trial any objection on the ground of jurisdiction was taken.

Robson, for the Appellant, *Harrison* the younger:—

The verdict of the jury was unwarranted by the state of the evidence; there having been no evidence in support of the Plaintiff's case at the trial, and none in opposition to the case made by the Defendant. In such a case the Court may, if it thinks fit, disregard the finding of the jury, without directing a new trial: *Ex parte Norton* (1).

E. C. Willis, and *Finlay Knight*, for the Respondent, the trustee, urged in objection that the application for a new trial had been refused by the Judge.

BACON, C.J., said there was nothing in this objection.

Robson, in continuation:—

The remarks of Lord Justice *James* in *Ex parte Morgan* (2) shew that even if, assuming the finding of the jury to be correct, there are other facts or circumstances which enable the Court to pass over that finding and pronounce a decree adverse to the party who has obtained the verdict, the Court may pass over the finding.

The case having been thus far opened,

BACON, C.J., inquired what jurisdiction the Court of Bankruptcy had to try a matter of this kind at all.

Robson, having stated that he took this objection as well,

E. C. Willis, and *Finlay Knight*, for the Respondent:—

Two recent authorities in which this point has been discussed are *Ex parte Brown* (3) and *Ex parte Swinbanks* (4). The former authority shews that where the trustee is claiming "by a higher and better title than" the bankrupt, the matter must be dealt with by the Court of Bankruptcy; and the latter shews that the objection to the exercise of jurisdiction must be taken at the earliest possible moment.

BACON, C.J.:—What higher or better title can the trustee in

(1) Law Rep. 16 Eq. 397.
(2) 2 Ch. D. 72, 82.
(3) 11 Ch. D. 148.
(4) Ibid. 525.

C. J. B. 1880 *Ex parte* HARRISON. *In re* HARRISON.

this case have than the bankrupt himself had? Could the bankrupt himself have impeached those deeds?

Willis:—The trustee has this higher and better title, that he sues in the interest of creditors, and thus the remark of Lord Justice *James* in *Ex parte Brown* (1) applies.

BACON, C.J.:—There is another remark of the Lord Justice, which also applies, namely, that where the trustee takes only that which the bankrupt himself could have taken, the matter should be left to the ordinary tribunals. No question of fraudulent preference under sect. 92 can arise here, for the deeds were executed more than twelve months before the bankruptcy. Nor were they attempted to be impeached until four years after the bankruptcy, and then, as it appears, solely under the statute of *Elizabeth*.

Willis:—The object of the whole proceeding has been to determine whether the intention of the instruments was to defeat creditors. The bankrupt himself could not have impeached the deeds, but the trustee can do so in the interest of creditors.

BACON, C.J.:—

It appears to me that the proceedings in this case have been wholly wrong. The trustee had no right to have this question tried before a jury. If any ground existed for setting aside these deeds, it ought to have been asserted in some other jurisdiction. The Court of Bankruptcy has no jurisdiction. The order must be set aside, but inasmuch as the Appellant himself had abundant opportunity of disputing the jurisdiction, and ought to have done so earlier and at once, though the order appealed from must be discharged, it will be without costs.

Solicitor for the Appellant: *John Burton*, agent for *Thomas Cooper, Congleton.*

Solicitors for the Respondent: *Llewellyn, Ackrill, & Hammack*, agents for *E. Tennant & Co., Hanley.*

(1) 11 Ch. D. 149.

In re METROPOLITAN DISTRICT RAILWAY COMPANY AND COSH.

[1879 M. 16.]

C. A.
1879
FRY, J.
April 5.
C. A.
1880
Feb. 4, 5.

Railway Company—"Superfluous Land"—Land over Tunnel—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 127.

A railway company purchased land for the purpose of making an underground railway. They excavated the soil, constructed the line, and then built an arch over it, and replaced the surface over the arch:—

Held, by *Fry*, J., and by *James* and *Cotton*, L.JJ., *Baggallay*, L.J., doubting, that the company were not authorized by sect. 127 of the *Lands Clauses Consolidation Act*, 1845, to sell the vacant space over the arch as "superfluous land."

"Superfluous land" must be land separated by a vertical, not by a horizontal, boundary from land required for the purposes of the company.

THIS was a summons under the *Vendor and Purchaser Act*, 1874, asking a declaration that the vendor, under a contract for the sale of land, had no right or title to sell part of the property comprised in the contract.

On the 18th of July, 1878, the *Metropolitan District Railway Company* put up for sale by auction various pieces of land, which were described in the particulars of sale as freehold land, suitable for building. At the sale, *R. L. Cosh* became the purchaser of Lot 4 and Lot 7. Lot 4 was described in the particulars as a "very important and highly valuable freehold building site, adjoining the *District Railway* station," at *Hammersmith*. It was shewn on a plan, and coloured thereon partly pink and partly blue; the part "coloured blue on the plan having already the surface or ground line constructed and consolidated over the railway for the erection of a splendid range of business premises. The railway company reserve the six feet margin of land in rear of plot coloured blue, as shewn on the plan, and the plans, sections, and elevations for the erection of any building over the area coloured blue, must be submitted to and approved by the company, as it is over the railway tunnel."

Among the conditions of sale were the following:—

"22. The following clause must be inserted in the conveyance

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of the land coloured blue, and of any other land lying over or abutting upon the company's railway and works:—'The company, their successors and assigns, reserve to themselves at all times hereafter the line of railway of the said company, and their tunnels and other railway works lying under or adjoining the same lands, and the substratum or soil under or beneath such reserved railways and works, together with all rights and privileges under the company's Acts of Parliament, or any Act incorporated therewith, and reserve also in particular power to the said company, their successors and assigns, for them and their engineers, surveyors, workmen, contractors, and agents, at all times to enter (either with or without engines, machinery, building materials, and other articles and things) into and upon so much of the said lands so conveyed, and the buildings thereon erected, as are abutting on or over the same railway or works, to satisfy themselves by inspection that the conditions imposed on the purchaser, both as to the construction and use of such buildings, are adhered to, and to make and execute such works as may be necessary for renewing, repairing, or altering the said line of railway and works, and for securing the uninterrupted user of the said railways and works, the said company, their successors and assigns, making reasonable compensation to the purchaser, his heirs and assigns, for all injury caused by the exercise of any of such powers, the amount of such compensation to be settled in case of difference by two arbitrators (one to be appointed by either party in difference), or their umpire in the usual manner. And the purchaser shall for himself, his heirs and assigns, covenant with the said company, their successors and assigns, that no building or erection whatsoever shall be raised or constructed upon the said land coloured blue, or any part thereof, or on other land over the company's railway, until the designs for the same, and the materials and mode of construction thereof, have been submitted to and approved (in writing) by the said company, their successors and assigns, who shall approve the same, if in their judgment they are suitable both as to arrangement of walls and distribution of weights to the girders which have been placed across the railway to carry such buildings; and it shall be provided and expressly agreed that such buildings or erections on the

said land coloured blue, or on any other land over the company's railway, shall not in any case have more than three storeys, and and shall not exceed forty feet in height from the pavement line to the parapet line, and the weight on each floor, including the weight of the floor itself, shall not in the erection or subsequent use thereof, exceed two hundred-weight per square foot; and it shall also be specially provided that no windows or other openings shall be made in any buildings erected on any of the land sold, overlooking the railway station of the said company, without the special leave of the company.' "

The company had acquired the land for the construction of this part of their line of railway under two Acts passed in 1875 and 1877, with which the *Lands Clauses Consolidation Act*, 1845, was incorporated. The Acts contained no special provisions with regard to the sale of superfluous land, but the 7th section of the Act of 1875 (38 & 39 Vict. c. ccviii.) provided that persons empowered by the *Lands Clauses Act* to sell and convey or release lands might grant to the company any easement, right, or privilege required for the purposes of the Act in, over, or affecting any such lands. The company, after they had acquired the land, cleared the surface and excavated a cutting. They then built a retaining wall on each side of the cutting, covered the cutting with an arch, placed iron girders across, and restored the surface over the arch. The part of Lot 4 which was coloured blue on the plan was a portion of the vacant space over the top of the arch.

The summons asked a declaration that the company had no right or title to sell Lot 4, and that the contract, so far as regarded that lot, might be rescinded, and the company ordered to repay to the purchaser his deposit with interest.

The summons came on for hearing before Mr. Justice *Fry* on the 5th of April, 1879.

Glasse, Q.C., and *Sefton Strickland*, for the purchaser:—

The company have no more power to sell the space over the arch of their tunnel than they would have to sell the railway itself. They may want to enlarge their tunnel or to repair it. *Mulliner* v. *Midland Railway Company* (1) is a decision directly

(1) 11 Ch. D. 611.

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in point. There the Master of the Rolls held that a railway company could not grant a right of way in fee through some arches upon which their station rested. This land over the tunnel is not "superfluous land"; it is land required for the purposes of the company's Act.

[They were stopped by the Court.]

J. Pearson, Q.C., and *S. Roberts*, for the company:—

If the company are not entitled to sell this land, the result will be that all the land over their underground line must be left unoccupied, and they will lose the value of it. They might as well have constructed their line in an open cutting.

They could not grant a ninety-nine years building lease. The object of making the line in a tunnel was to avoid the expense of leaving the surface unoccupied. *Mulliner* v. *Midland Railway Company* (1) does not apply. The right of way there granted might possibly have interfered with the company's use of the arches for the purposes of their undertaking. The evidence of the company's manager shewed that the arches might be required as warehouses for the purposes of their traffic. Here the surface is not required for the purposes of the railway. The railway is to be confined within a tunnel, and it has nothing to do with what is outside, except so far as there may be a right of support for the tunnel and the line. The superincumbent weight on the arch of the tunnel is a mere incumbrance if we are obliged to leave it vacant. We cannot use the space as pasture ground for cattle; that would be *ultrà vires*.

[FRY, J:—Where a railway company are going to tunnel under land they cannot enter on it without first making compensation to the owner: *Pinchin* v. *London and Blackwall Railway Company* (2); *Ramsden* v. *Manchester, &c., Railway Company* (3); *Lands Clauses Consolidation Act*, s. 6; *Railways Clauses Consolidation Act*, s. 16. For the purpose of making a tunnel the company must acquire the entire land through which it passes, up to the surface, because it is required for the purposes of their Act.

(1) 11 Ch. D. 611.

(2) 4 K. & J. 34; 5 D. M. & G. 851.

(3) 1 Ex. 723.

How, then, can they sell that very land which they have so acquired?]

The surface is not required for the purposes of the railway, and it is therefore superfluous land. Railway companies are constantly compelled to purchase more land than they actually require.

[FRY, J., referred to the judgment of Lord *Cairns* in *Great Western Railway Company* v. *May* (1) as defining the meaning of "superfluous land."]

The fourth class which he there mentions includes the present case, *i.e.*, land taken by the company originally for a temporary purpose, which temporary purpose has come to an end. We could not alter our tunnel without obtaining fresh parliamentary powers; if we want to repair it the special conditions of sale secure us the right of doing that.

FRY, J.:—

The question is as to the power of the railway company to sell Lot 4 in the particulars of sale which are now before me. That lot consisted in part of land in the ordinary sense of that word. It consisted, in other part, of what the vendors described as land, but which appears to me not to be land at all in the ordinary sense of the word. It was a right to build a house of a particular defined description over the roof of an arch. And this lot was sold subject to certain special conditions with regard to that portion of it which was over the arch. The question then turns upon this, whether this so-called land is "superfluous land" within the meaning of sect. 127 of the *Lands Clauses Consolidation Act*, which gives the power of selling "superfluous land," for the company's special Acts contain no special provisions with regard to superfluous land. The piece of blue land is a portion of the summit of the arch with the railway beneath it, and the question is whether that summit of the arch is "superfluous land."

In the first place it is not land according to the ordinary meaning of the word "land." It is no more land than the roof of a house is land. If I sold the roof of my house, I certainly should

(1) Law Rep. 7 H. L. 283, 292.

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not sell that as land if I reserved the house and everything below it. It is said that it is superfluous land, because there is no reason why superfluous land should not be separated from land required for the purposes of the undertaking by a horizontal line as well as by a lateral or a vertical line. But it appears to me that, according to the ordinary meaning of the word, land must be that in respect of which you have a right from the centre of the earth to the heaven above, and that in defining what is and what is not superfluous land, the ordinary division of land by lateral boundaries must be followed.

I think considerable light is thrown upon the question by the language used in other sections of the *Lands Clauses Consolidation Act* with regard to land required for the purposes of the railway, because, with regard both to land taken by agreement and land taken otherwise than by agreement, the only lands which the company can take are such lands as are required for the purposes of the Act. In the case of a tunnel they are required to take the land in the ordinary sense from the very centre of the earth to the heaven above. They cannot take less than that. That seems to me to be the result of the decisions, and it shews that the whole of the land (in the ordinary sense of the word) so taken is land required for the purposes of the Act, although a portion of it only is occupied by the tunnel. And, by parity of reasoning, it seems to me to follow that the company cannot say that any land above or below the land actually used for the purposes of the railway is not land required for the purposes of the Act. I think, therefore, that, however convenient it may be for the company to sell, or to grant building rights over, or building leases of, the crown or roof of their tunnel, they have no title to do so under the statutory powers with which they are invested.

I also think that the case of *Mulliner* v. *Midland Railway Company* (1) is a strong decision corroborating the conclusion to which I have come. It is very difficult to draw any distinction between the decision of the Master of the Rolls on the first two questions which he dealt with in that case and the present case. But, independently of that decision, it appears to me to be reasonably plain that this crown or roof of the tunnel is not super-

(1) 11 Ch. D. 611.

fluous land within the meaning of the Act, and that therefore the company can make no title to it. I must make a declaration accordingly, and I must direct the company to return the deposit with interest at 4 per cent.

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Glasse, Q.C.:—In *In re Coward and Adam's Purchase* (1) the Court declined to give costs.

FRY, J.:—I think there is no doubt about the power under sect. 9 of the *Vendor and Purchaser Act*, 1874. But there was a fair point for discussion in the present case, and I shall make no order as to costs.

The company appealed. The appeal came on for hearing on the 4th of February, 1880. C. A.

J. Pearson, Q.C., and *S. Roberts*, for the appeal:—

We say that this is land which we do not require for the purposes of the undertaking, and that we have power to sell it. There is nothing in the Act which says that the superfluous portions of land can only be distinguished from what is required by a lateral and not by a horizontal boundary.

[JESSEL, M.R.:—You might want it for the purpose of repairs. Suppose the girders were to give way?]

We can dispose of it subject to an easement giving us right to enter for repairs. Our Acts give us power to purchase easements, so there cannot be any objection to our selling land subject to an easement. The company might have bought merely an easement to make the tunnel. Why, then, may they not, after completing the tunnel, put themselves in the same position as if they had done so. The Legislature considered that an easement would be sufficient for the purposes of the company. So, if the company purchases more, the surplus may fairly be considered superfluous. Under sect. 127 of the *Lands Clauses Act* the company could be compelled to sell, for they have no use for this land, except a remote accidental use of it for repairs.

[JESSEL, M.R.:—Not accidental. Everything gets out of repair

(1) Law Rep. 20 Eq. 179.

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in time, and we cannot enter into the question how long your tunnel will last.]

At all events, the use would be rare and temporary. In other cases, as in *Mulliner* v. *Midland Railway Company* (1), there has been a question whether the company might not permanently want the land. If the company is to retain this land, what must it do with it? Must the surface be left waste? The Act of last session, the *Metropolitan and Metropolitan District Railways* (*Inner Circle, City Lines, and Extensions*) *Act*, 1879 (42 & 43 Vict. c. cci.), s. 42, gives full power to make such a sale as that now in question.

[JESSEL, M.R.:—That Act was not passed till after the decision of Mr. Justice *Fry* in this case; so you are in the same position as if you acquired a title after a bill for specific performance had been dismissed.]

Mr. Justice *Fry* appears to have overlooked the fact that a railway company, when it purchases, does not acquire the soil up to the sky and down to the centre of the earth; for by the *Railways Clauses Act*, 1845 (8 Vict. c. 20), s. 77, the minerals are excepted, so that the company only gets a horizontal strip.

[JESSEL, M.R.:—That is not so. The minerals only are excepted, with a right to get them. The space they occupy belongs to the company.]

The understanding of conveyancers on sales of this nature is shewn by *Davidson's* Precedents (2), and it would be dangerous to disturb it.

Glasse, Q.C., and *Sefton Strickland*, *contrà*:—

It cannot be supposed that the Legislature intended the surface of a tunnel of this kind to be superfluous land which would vest in the adjoining owners. This is really nothing more than a roof with soil upon it. *Mulliner* v. *Midland Railway Company* is an authority that a horizontal stratum cannot be treated as superfluous land; and in the present case, even this property which the company profess to sell is not superfluous, as is shewn by their own conditions of sale, by which they reserve rights over it.

(1) 11 Ch. D. 611. (2) 4th Ed. vol. ii. p. 593.

J. Pearson, in reply.

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JESSEL, M.R.:—

The appeal in this case raises a very important question as to the proper construction of the 127th section of the *Lands Clauses Act*. There are special circumstances in this case which I think might enable the Court to decide it without expressing any general views as to the construction of the Act. But inasmuch as the general question has been argued before us, and as the case can be decided upon the general as well as upon the special ground, I intend to give my opinion upon both questions.

The first point to be decided is what are superfluous lands within the meaning of the 127th and following sections of the *Lands Clauses Consolidation Act*. In the case of the *Great Western Railway Company* v. *May* (1), it was decided that the word "thereof" in the preamble to those sections is to be read as meaning "of the undertaking," and consequently the sections are to be read as dealing with lands "which shall not be required for the purposes of the undertaking." The 127th section enacts that within the prescribed period, or if no period be prescribed, then within ten years the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands. This is not a power of sale but a direction to sell, and in default thereof the superfluous lands are thereupon vested in and become the property of the owners of the lands adjoining thereto. The point has not been argued whether land which becomes superfluous, but does not become so until after the prescribed period, and which therefore does not so vest, may not be sold. I do not give any opinion upon that point. It may well be that there is a power of sale in the railway company of certain lands, though they are not compelled to sell them within this section. In the case I put it is impossible that they could sell them within the section, because the section provides that superfluous lands are to be sold within ten years after the expiration of the time mentioned in the special Act for the completion of the works. Therefore I do not think that it necessarily or inevitably follows that because lands are not liable to be sold compulsorily within the 127th section there is no

(1) Law Rep. 7 H. L. 283.

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power in the railway company to sell them when they cease to be required for the purposes of the railway. I say this because it may be a very important question, and requires more discussion and more consideration than has been bestowed upon it in the present case, where the argument was expressly and avowedly and purposely limited to a sale under the 127th section.

Now as regards what are the lands which must be sold. Speaking for myself, I have no doubt that no land of which any part in a vertical line is required for the purpose of the railway vests in the adjoining landowners for want of sale within the ten years. Indeed the decisions have gone further, and as regards what I will call the lateral extension of land, it has been held, and I think rightly, that it is not necessary that every portion of the land should be required for the purposes of the railway, but that if, as a whole, it is fairly required for those purposes, no part of it becomes superfluous, which is a much stronger proposition. Therefore, I am of opinion that if the subsoil which is reserved here, or the tunnel, is required for the purposes of the Act, no part of the land is required to be sold within the ten years, and no part of that land vests in the adjoining landowner by default. That, of course, does not touch the question of the power of sale, which I think is a totally distinct question.

The reason of this appears to be plain. First of all, the preamble begins "with respect to lands acquired by the promoters of the undertaking." It has been decided that the word "lands" does not include an easement. The promoters of the undertaking have no right to require a landowner to sell them an easement. Then the preamble speaks of lands "acquired" not being "required." Is not the word "lands" to have the same meaning in both branches of the sentence? There is only one word used, that is, "lands," and it must mean the same thing throughout. The preamble then deals only with lands as distinguished from easements. Can anybody say of a piece of land, a portion of which in a vertical section is required, that that is land not required? If a part is required you cannot say that the land is not required. Therefore it appears to me that land so circumstanced cannot be superfluous land. Then sect. 127 enacts that the company must sell the superfluous land, and if unsold it is to vest in the adjoining

owners. It would be an extraordinary thing if a railway company were to be compellable to decide as to the necessity of retaining the horizontal strata of every piece of land in their possession from the beginning to the end of their line; for the argument on behalf of the Appellants must go to that length. Before the end of ten years, if "land" includes for this purpose the air above, they would have to examine their line from end to end, and go to the expense of taking the advice of engineers, architects, and other persons to say how much of the air on that railway, how much of the land above the railway where it is in a tunnel, and not only that, but how much of the substratum below the railway, is required for the purposes of the railway, and all the rest must be actually sold away or else vest in the adjoining landowners. That, to my mind, is absurd. The notion that the adjoining landowner could enter and dig under the railway, and say, "I have found that you have got twenty-five feet above me; you do not want this part to support your railway, and therefore it is vested in me," is absurd. I am not speaking of minerals but of the soil. It cannot, in my opinion, have been the intention of the Legislature that any such result should follow. Therefore it appears to me to be plain, on the wording of the Act, that "land" in the 127th section means land properly and ordinarily so called, and does not apply to a mere easement or a slice of the land taken horizontally.

But besides that we have another series of difficulties. Supposing it were an engineering question, as it is in this case, for what purpose the surface of the tunnel would be required—one engineer might think a certain portion of it should be kept, if it is not very thick, especially to prevent rain coming through, and injury and damage to the tunnel; another engineer may think that a larger portion ought to be kept; and a third engineer might think that still more ought to be kept, because the company might want to make new air passages to keep the tunnel dry, or to enter very frequently for the purposes of repairs. It cannot be supposed that the Act intended to vest anything in the adjoining landowners where such a series of questions would be left open between the railway company and the landowners. I am satisfied that the word "land" here is used in its ordinary sense, that the

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word "superfluous" is used in its ordinary sense, and that none of these questions were intended to be left open.

These considerations would entirely decide the question upon the General Act, but I think it right also to refer to *Betts* v. *Great Eastern Railway Company* (1), which I think covers almost all the ground over which I have been going. In that case Lord Justice *Bramwell* says (2): "I do not think that the Legislature intended that when a piece of land taken as a whole is wanted for the purposes of the railway, a discussion should be allowed whether small portions of it are superfluous. I do not think that if a railway company claim to retain a strip of land five yards wide for the purpose of making a road, when a width of four yards would be sufficient, an adjoining owner can recover as superfluous any portion of the strip of land. A Court of Justice must consider whether the land is substantially wanted; if it is, the company are entitled to retain the whole." His illustration of the five yards and the four yards appears to me apply to this case exactly. They require to retain the substratum, they require to retain the land in which the tunnel is made, and they require to retain something above—it may be a very thin line or it may not. Suppose the adjoining landowner to say, "You are claiming to require too much." Who is to be the judge of that? Surely the railway company. The adjoining landowner is not to come in and say, "Four yards will be enough for you, and you have kept five yards." Then Lord Justice *Cotton* says (3): "I need not say anything as to this matter, except that I quite agree with what has fallen from Lord Justice *Bramwell*, viz., that when the question arises whether a piece of land is superfluous, it is immaterial to consider whether a small portion of it is or is not required; the piece of land must be considered as a whole, and the judgment of the Court must depend upon this, whether or not the piece of land as a whole is required for the purpose of the undertaking. I think it would be unreasonable that a railway company, after the expiration of their compulsory powers, should be compelled to part with a portion of the piece of land which, regarded as a whole, is useful to them for their undertaking." That case went to the House of Lords, and the decision

(1) 3 Ex. D. 182. (2) 3 Ex. D. 187.
(3) 3 Ex. D. 193.

was affirmed unanimously by the Lords present. Lord *Cairns*, in giving judgment, said that it was quite sufficient if the land was fenced off and retained *bonâ fide* for the purposes of the Act. His Lordship says (1): "I understand the finding to amount to this: that the land was retained by the company *bonâ fide* for the purposes of their Act, and that the reason why they did not sell it was that they wished to carry out those purposes. The verdict appears to me to be consistent with the evidence and with what I understand to be the object of the Act." Then Lord *Penzance* says: "I agree that the finding of the jury must be taken in conjunction with the evidence given, and I think it means that the company's purpose was genuine and honest, and one that they intended to carry out, and I therefore cannot say that the lands were superfluous. I admit that it is very difficult to lay down a general rule. Here the ten years have elapsed, and this is a matter for fair comment; but if it is found that the object of the company in not selling the land was *bonâ fide*, it does not seem to me that the delay affects the question, though I can, of course, imagine cases where the delay has been so long as to be inconsistent with the existence of *bona fides*." Now, there both learned Judges look at the *bona fides* of the company in retaining the land. Then Lord *Blackburn* says: "The words are, not 'used,' but 'required,' and it is impossible to lay down any universal rule as to what is 'land required' for the purposes of the Act; but I think they may be taken to be lands so 'required' if they are retained for a definite purpose and in good faith." The case before us goes far beyond that. No one can say exactly, and no one does say exactly, how much of the land, or how often even what the company professes to sell, will be required for the purposes of the railway, and it is clearly shewn that a very large portion, viz., all the subsoil, and all the tunnel, is required for the actual purposes of the railway.

When we come to the special circumstances the case is made still stronger. What the company did, as we are told by the Appellant's counsel, for there is no evidence, was this: They took this piece of land (it is in the metropolis), they made a cutting in it, they then made their railway in the cutting, they then covered over the cutting with brickwork, and they put heavy girders on

(1) 28 W. R. 51. WN(1879)63.

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it, not for the purpose of completing the railway, but for the purpose of supporting houses. So that they manufactured, if I may say so, that which they now call land. Before that it was air. When they had completed the railway, if they had completed it in ordinary course and without any view to a sale, what would there have been to sell? Nothing at all but the stratum of air. Their open cutting would have done very well; they only covered it in with a view to get something to sell above it. Would any one say that under this Act, though the word "land" includes everything from the heaven on the one side to the centre of the earth on the other, the stratum of air vests in the proprietor whose land adjoins, or that it was intended to give him any rights over the stratum of air? Then does it make any difference that the company put some bricks there, or put some girders there, or that they put some earth above? That cannot alter the rights of the adjoining landowner. If the company had a right to keep the air, they must have a right to keep the girders and the brickwork too, if rightly made, as part of their works; and their putting earth above the girders cannot affect the rights of the adjoining landowner or the right to sell.

It is suggested that the company might possibly fill up and abandon the railway. That would raise a totally different series of considerations, because then I take it even the subsoil would be saleable, and whether they filled it up or not the same result would follow.

But the case does not stop there. There is not only no conclusive evidence that this artificially made soil is not required, which there ought to be, because, as I read the Act of Parliament, the railway company, having properly acquired the land for the purposes of the Act, must, in order to make it superfluous, shew that something has since happened which makes it superfluous; but there is no evidence at all to that effect, and that being so, the presumption that it is required for the purposes of the railway is not rebutted.

But here we have something more. The railway company do not profess to sell this simply as superfluous land. They attempt to sell it, reserving all below the crown of the tunnel, not, as was suggested in argument, reserving to themselves an easement, but

reserving to themselves the land itself, the thing they had bought and had scooped out, and the subsoil, and more than that, reserving easements in this erection or manufactured soil which they had put above the tunnel. Therefore it appears to me to be clearly proved by their own conditions of sale that the land purchased was required for the purposes of the railway.

But I go further. I say that this very manufactured soil was required for the purposes of the railway. If they want it for the purpose of maintaining their railway, the two purposes of the Act being making and maintaining the railway, it appears to me that they want it for the purpose of the railway. [His Lordship here read the reservation provided for by the 22nd condition of sale.] The company reserve to themselves in the largest and fullest terms a right to use what is sold, so far as is necessary, for the purpose of the maintenance of their works. Now, if that which is sold is required for the purpose of the maintenance of the works, it appears to me it is required for the purpose of their Act; and if this condition is to be taken to be inserted because it is wanted—and I do not think the company can complain of that view, because they ought to have sold free from the condition if it was not wanted—it furnishes irresistible evidence that even the land sold was required for the purposes of the railway. It is a mistake, in my opinion, to say that because it is only wanted in a particular way which by law can be carried out by a grant of an easement, therefore it is not wanted. There is another way of effectuating the object for which it is wanted; but it is wanted, it is required, and, in my opinion, clearly required, for the purposes of the railway, and was therefore not saleable at all.

That being my opinion, I think the decision of the Court below was right, and ought to be affirmed.

BAGGALLAY, L.J.:—

As the other members of the Court agree in opinion, and as that opinion is in favour of affirming the decision of Mr. Justice *Fry*, the doubts which I entertain as to the correctness of the views taken by them cannot affect the decision to be arrived at. My views upon the subject do not amount to dissent, but I desire to indicate very shortly what my doubts are.

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In the first place, I think that what the railway company propose to do is a reasonable thing. Having constructed their line in part by way of a tunnel, they propose to utilize the soil above that tunnel by selling it, not making an out-and-out sale for all purposes, but reserving to themselves the right of interfering with what they part with so far as may be necessary for the purpose of maintaining and repairing the railway from time to time, and for doing whatever the interests of the public may require to be done.

And for this purpose, they omit from the proposed sale, in other words they reserve to themselves, all the substratum of soil beneath the railway which they have constructed, and only purport to sell that which is above the tunnel, securing to themselves the right of entering upon that which is above whenever it may be necessary for them to do so for the purpose of repairing the tunnel. That does not appear to me an unreasonable thing for them to do. At the same time it may be a thing which they are not at liberty to do, and I now propose to indicate shortly the doubts which I entertain as to their suggested inability to do it.

In the first place, the preamble of the 127th and following sections of the *Lands Clauses Act* points out that it is proposed to make provision by those sections for dealing with lands acquired by the promoters of the undertaking under the provisions of the Act but which shall not be required for the purposes of the Act. Those two things must combine, otherwise there is no power to sell. Of course it will not be disputed that they are under no obligation, when putting in force the powers of these provisions, to deal with the whole of the land which they acquire in any particular instance. A portion of the land so acquired may be retained for the purposes of the railway, and yet other portions of that land may not be required, and the section applies to land of that kind.

Now a point was made by Mr. *Pearson* early in his argument that there is nothing to be found in the Act which requires that, if a portion only of the land acquired is to be dealt with, that that portion must be defined by a lateral boundary. He contends that the lands which the company propose to keep may be divided from those which they propose to sell by a horizontal boundary.

I am bound to say that at present I doubt whether the opposite view of the case is well founded. I can well understand that there may be cases in which the horizontal boundary must of necessity be adopted, but as regards the particular case with which we are now dealing, and others of a similar kind, I go no further than to say that I entertain a doubt whether it is obligatory to do so.

Assume land to have been acquired for the purposes of a railway, and a tunnel to have been constructed in the ordinary way, the company having been compelled by the requirements of the vendor to take the whole of the land above the tunnel to the surface, there being no special provision as to how the surface land is to be dealt with. There may be forty or fifty feet of soil above the tunnel. Now if, after the railway has been completed, the mass of earth above the tunnel being such that any subsequent repairs must of necessity be done from the inside and not from the outside, I should as at present advised be disposed to hold that the company might make a severance by a horizontal division of the land so acquired, retaining all below the railway and a certain portion above the railway, within limits to be regulated by the nature of the case, and at the same time parting with, under the 127th section, the portion of land above that horizontal boundary.

There is another point in respect of which I feel some doubt. Under the 7th section of the special Act a power is conferred upon the company to acquire easements in lands which they might otherwise have been compelled to purchase for the purpose of this railway. Now as at present advised it appears to me that under that 7th section of the Act of 1875 the company, instead of acquiring an absolute interest in the land through and upon which this tunnel has been constructed, might have entered into an agreement with the vendor by virtue of which they might have constructed their railway, reserving to the vendor all the land above the surface of the railway, and at the same time have stipulated for the company entering upon the land so reserved for the purpose of repairing their railway. The matter has not been very fully gone into, but I am disposed to think that it might have been open to them to enter into such an agreement originally. They have not done so. They have not acquired the easement

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directly, but what they have done is this: They have purchased a lawful interest. They propose to sell a portion of that lawful interest, and in respect of that to now reserve to themselves the right which might have been stipulated for originally. I am not prepared at the present moment to say that they would not, in doing so, be carrying out that which, under the 7th section of their Act, they were at liberty to do. I do not go so far as to say that they could do this, but I am not satisfied that they could not. No doubt difficulties may arise in adopting a horizontal division between the land retained and the land parted with. The Master of the Rolls has put them very forcibly. I feel the force of them; but in every class of case, in which a portion of the land acquired is to be retained and another portion is to be parted with as superfluous land, difficulties more or less must occur. Nor do I think that in any case the right of the adjoining owner to have the property vested in him is exactly equal to that of the railway company to sell; in every judgment which has been delivered upon the subject, a certain amount of discretion has been recognised as remaining in the company. If the company suggest that they have a *bonâ fide* intention of using the land for the purposes of their railway, that has been held sufficient to prevent the adjoining owner claiming it, and it will not in a case of that kind be left to any nice question between the one engineer and the other whether it will or will not be required. I do not think, upon a consideration of the effect of the two branches of the 127th section with regard to the right of sale on the one hand, and the right to claim a vesting on the other, that they are co-extensive.

I have indicated the doubts I entertain upon this question. As I said before, they only amount to doubts. If they had been stronger than doubts, and had amounted at the present time to dissent from the view which, I gather, my colleagues adopt, I should have asked for further time to consider the matter. But, having regard to the decided opinion entertained by them, I do not think that my doubts are of sufficient weight to induce me to press for delay.

Cotton, L.J.:—

In this case the railway company have rested their right and

power to sell the land in question upon what I may call the superfluous land clauses in the *Lands Clauses Consolidation Act*, and therefore I apply myself to the consideration whether or no the land in question, or what the company call land in this case, does or does not come within the definition of land not required for the purposes of the railway within the meaning of those clauses.

Every case has to be decided upon its particular circumstances, and it is not necessary, in my opinion, for the decision of this case to decide whether or no, under any circumstances, there can be a horizontal division of land which has been taken by the company so as to bring any horizontal section of that land within the operation of these sections of the *Lands Clauses Consolidation Act*. But I must say that my opinion agrees with that of the Master of the Rolls, that under these clauses a horizontal section of land cannot be deemed land coming within their operation. They apply to land which the company are, at the expiration of the specified period, bound and compellable to sell, that is to say, if they do not, the adjoining landowner, or the person from whom it was bought, as the case may be, may claim that it has vested in him; and when we find that land, so far as regards the power of the company to buy, has been considered and construed as land in the ordinary sense, that is, land from the centre of the earth up into the heaven, and not as applying to any horizontal section of land, that, *primâ facie*, is the meaning to be given to the word "land" in these clauses. There would be such enormous difficulties if the adjoining owner were entitled to say to the company, "A particular section of the land which you bought either above or below your railway, or a particular easement in that land, is not required for the purposes of your railway, therefore it vests in me," that I agree with the Master of the Rolls that in these sections land cannot be taken to mean a horizontal section of land so as to require and compel the company to sell that horizontal section if they do not require it, or to enable the adjoining landowner to say that it is vested in him if they do not require it. The opinion expressed by me and by the other Judges in the Court of Appeal in *Betts* v. *Great Eastern Railway Company* (1) would, I think, apply to such a case, that as a particular close of

(1) 3 Ex. D. 182.

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land must be treated as a whole, and you cannot go minutely into the question whether or no every portion of it is required for the purposes of the railway, so as regards land purchased by a railway company you are not to consider whether any particular horizontal section of it is or is not required, but only whether the land as a whole is required for the purposes of the railway. But the present case turns upon its particular circumstances, and even if my opinion upon the general question had been different, I should have thought that the decision of the Court below ought to be affirmed. For what is it that the railway company in this case are proposing to sell? What they really are proposing to sell is the right of support over their line for the construction of houses or warehouses, not to exceed a certain weight. They made an open cutting. Over that open cutting they put, I suppose, a brick arch, and then girders, and then upon those girders, with some brickwork they put a certain quantity of earth, and what they propose to sell is, not the land, reserving to themselves the tunnel which they thus constructed, but to sell what they call this building site, reserving the tunnel and reserving all the land below, and therefore, in substance, giving nothing to the purchaser but the right of support over their railway, the right of constructing a house to be supported by girders artificially constructed by them, so as to cover in the open cutting which they had made. If, under any circumstances, a horizontal section of land could, under the superfluous land sections of the *Lands Clauses Consolidation Act*, vest in the adjoining owner, could it be held that a mere artificial construction erected by the railway company vests as land in the adjoining owner because the company may not have sold and disposed of it in ten years? In my opinion, no. That would not be to vest in the adjoining owner a part of the land which he had sold, but it would be to give him separately from the land a work artificially constructed by the company on land which was still used and required for the purposes of the railway.

Again, if we look at the circumstances, how would this case have stood if, independently of what I have already dealt with, the adjoining owner had brought an action of ejectment against the railway company? Would there have been any answer to this

contention on behalf of the company: "We may reasonably want this construction. We cannot tell when, but we may reasonably require it for the purpose of examining our girders, for the purpose of repairing our tunnel, and for the purpose, from time to time, of making alterations in our railway and in our station"? This land was acquired for the purposes of the railway, and it lies on the railway company, who assert that they have acquired a power to sell it, to shew that it is no longer required. But we find that they put up the property for sale under a condition which must have had a depreciative effect, a condition, therefore, which they would not have put in without a sufficient reason, shewing, not that they retain a particular easement over a particular portion of that land, but that they claim a right, and retain a right, to use it whenever they may find it necessary to do so, for various purposes, which the Master of the Rolls has already indicated. We must assume that, in the opinion of their engineers, the land may be required, or certain uses of the land, if it is land, may be required for the purposes of the railway, and, in my opinion, following the decision in *Betts* v. *Great Eastern Railway Company*, and many other decisions upon the point, it would have been impossible for the adjoining owner to contend that this property which the railway company now propose to sell, had against their will vested in him. If that is so, it cannot be superfluous land within the meaning of the *Lands Clauses Consolidation Act*, and the company have no power to sell it.

The recent Act of Parliament which has been mentioned cannot, in my opinion, be looked at, for it was not passed until after the Court below had given its decision on the point, and if, as matters then stood, that decision was right, in my opinion it put an end to the contract between the parties.

Solicitors for Purchaser: *Dawson, Bryan, & Dawson.*
Solicitors for Company: *Baxters & Co.*

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1880
Feb. 12

Ex parte GOLDING DAVIS & CO., LIMITED. *In re* KNIGHT.

Vendor and Purchaser—Stoppage in Transitu—End of Transit—Sub-sale.

The mere fact that the purchaser of goods has resold them, and that the bill of lading has been made out in the name of the sub-purchaser, does not put an end to the *transitus*, or destroy the right of the original vendor to stop the goods *in transitu*.

The rule being that effect will be given to a vendor's right of stoppage *in transitu*, so far as the exercise of that right will not interfere with the rights of third parties acquired for value, it follows that an unpaid vendor, who has given a valid notice to stop *in transitu* before his vendee has received the purchase-money of the goods from his sub-purchaser, is entitled, on the principle of *Spalding* v. *Ruding* (1), to have the original purchase-money satisfied out of the unpaid purchase-money of the sub-purchaser.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

Knight & Son were merchants in *London* and at *Liverpool*. *Golding Davis & Co., Limited*, carried on business as manufacturers of alkali at *Widnes*.

On the 15th of November, 1877, *Knight & Son* entered into the following contract with the company:—

"Messrs. *Golding Davis & Co.*

"We have this day bought of you the following goods of good merchantable quality:

"Twelve hundred (1200) drums, 5/6 cwt. each, white 70% caustic soda, your own make, per *Huson's* sampling and test note.

"Delivery, 100 drums per month, January and December, 1878.

"Shipment, f. o. b. *Liverpool*.

"Price, £14 per ton.

"Discount, 2½% and com. 1%.

"Prompt 14 days after each delivery, or before delivery if required.

(Signed) "*Knight & Son*."

On the same day *Knight & Son* entered into the following contract with *D. Taylor & Sons*, of *London*:—

(1) 6 Beav. 376.

"Messrs. *D. Taylor & Sons.*

"We have this day sold to you the undermentioned goods of good merchantable quality:

"1200 drums, 5/6 cwt. each, white 70% caustic soda, *Golding Davis & Co.'s* make, *Huson Bros.* sampling and test.

"Mode of delivery, f. o. b. *Liverpool.*

Time of delivery, 100 drums per month, January and December, 1878, each month's delivery a separate contract.

"Price, £14 per ton.

"Discount, 2½%.

"Prompt 14 days after each delivery.

(Signed) "*Knight & Son.*"

The question in dispute on the present appeal related to the October delivery of 100 tons.

On the 28th of October, 1878, *Knight & Son's London* house wrote to their *Liverpool* branch, in pursuance of instructions which they had received from *D. Taylor & Sons,* as follows:—

"We inclose bills of lading for *Taylor's* 100 drums, *Golding's.* Please get them shipped at once, as *Taylor* wants bills of lading dated October. They are to go by sail to *New York.*"

On the 4th of November *Knight & Son's Liverpool* branch sent instructions to the company to ship the 100 drums at once on board the ship *Larnaca,* for *New York,* then lying at *Liverpool.* The *Larnaca* was a general ship. The goods were accordingly shipped by the company on the 7th of November. The wharfinger's receipt for the goods stated that they were received for shipment on board the *Larnaca* on account of *Knight & Son, Liverpool.* This receipt was handed to the shipping brokers of the ship, who then procured the signature of the master of the ship to the bill of lading.

The bill of lading stated that the goods were shipped by *David Taylor & Sons,* to be delivered at *New York* unto order or to assigns, he or they paying freight.

The sum payable by *Taylor & Sons* to *Knight & Son* for the goods was £370 10*s.* 3*d.*, and the sum payable by *Knight & Son* to the company was £366 14*s.* 3*d.* The bill of lading was handed

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by the shipping brokers to *Knight & Son's Liverpool* branch on the afternoon of the 7th of November, and was sent by them the same evening by post to *Knight & Son* in *London*, by whom it was received on the morning of the 8th of November. Meanwhile, on the 7th of November, *Knight & Son* (the partners in the firm all residing in *London*) had suspended payment, but this fact was not known to their *Liverpool* branch until the morning of the 8th of November. On the same morning the company received a circular informing them of the suspension. The *Larnaca* was still in dock at *Liverpool*, and the goods had not been paid for either by *Knight & Son* or by *Taylor & Sons*. The company at once telegraphed to *Knight & Son* in *London* not to part with the bill of lading, and they also served a notice of stoppage *in transitu* on the master of the ship, the ship's agents, and the brokers for the ship. *Knight & Son* had placed their affairs in the hands of Mr. *F. Cooper*, an accountant in *London*, to whom the bill of lading was handed on the 8th of November. On the 13th of November *Knight & Son* filed a liquidation petition, and on the 14th of November *Cooper* was appointed receiver under the petition. On the 4th of December the creditors resolved upon a liquidation by arrangement, and appointed *Cooper* trustee. The price of caustic soda had fallen £3 per ton since November, 1877, and it was arranged between *Cooper* and the company that the contract with *Taylor & Sons* should be carried out, and that their purchase-money should be paid into a bank in the joint names of *Cooper* and the manager of the company, pending the decision of the Court as to the validity of the notice to stop *in transitu*. This was done, and the goods were accordingly delivered in *New York*.

The Registrar held that the notice was of no effect, on the ground that, the bill of lading being in the name of *Taylor & Sons*, the property in the goods was transferred to them, and the *transitus* was at an end as between the company, the vendors, and *Knight & Son*, the purchasers, when the goods were placed on board the ship and the bill of lading was made out in the name of *Taylor & Sons*.

The company appealed.

De Gex, Q.C., and *E. Cooper Willis*, for the Appellants:—

The case is very like *Ex parte Rosevear China Clay Company* (1), except that there has been a sub-sale of the goods. The transit originally contemplated was not at an end when the notice to stop was given. The goods had not come into the actual or the constructive possession of either *Knight & Co.* or *Taylor & Co.* The mere fact that there had been a sub-sale did not destroy the original vendors' right to stop *in transitu*. Till the bill of lading had been handed over to *Taylor & Sons*, or the goods had been delivered to them, the property in the goods did not pass to them irrevocably: *Mitchel* v. *Ede* (2). The contract between *Knight & Son* and *Taylor & Sons* had not been completed; there had been no irrevocable appropriation of the goods. An unpaid vendor's right to stop *in transitu* can be defeated only by a *bonâ fide* transfer of the bill of lading for value: *Benjamin* on Sales (3); *Smith's* Leading Cases (4). If the bill of lading had been made out to *Knight & Son*, and they had indorsed it to *Taylor & Sons*, and then kept it in their pocket, that would have been equivalent to what has been done in the present case, and *Taylor & Sons* would have acquired no right which could defeat the company's right to stop *in transitu*.

[JAMES, L.J.:—In the present case a stoppage *in transitu* by the company would really have been a benefit to *Taylor & Sons*, for it would have relieved them from the necessity of paying for the goods, which had fallen in price.]

The original destination of the goods was not altered by *Taylor & Sons*, but the Registrar's *ratio decidendi* was that by reason of the sub-sale the master of the ship received the goods as the agent of *Taylor & Sons*, and that thus the original *transitus* had come to an end. But the real question is whether the destination originally prescribed is continuing, not whether it is continuing as between the original vendor and the original purchaser. The right of the vendor to stop continues until the goods arrive at the place of destination named by the purchaser: *Coates* v. *Railton* (5); *Whitehead* v. *Anderson* (6).

(1) 11 Ch. D. 560.
(2) 11 A. & E. 888.
(3) 2nd Ed. pp. 719 *et seq.*
(4) 8th Ed. vol. i. pp. 822 *et seq.*
(5) 6 B. & C. 422, 425.
(6) 9 M. & W. 518, 534.

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[JAMES, L.J., referred to *Ex parte Cooper* (1).]

It has been held in many cases that the vendor's right to stop *in transitu* will not be interfered with further than is necessary to give effect to the rights which have been acquired by third parties for value. It has been decided in cases where the bill of lading has been mortgaged or pledged, that the unpaid vendor, who has given notice to stop *in transitu*, is entitled to the proceeds of the goods *ultra* the amount for which they have been mortgaged or pledged: *In re Westzinthus* (2); *Spalding* v. *Ruding* (3); *Berndtson* v. *Strang* (4); *Coventry* v. *Gladstone* (5). The principle of those cases applies to the present, for *Taylor & Sons*' purchase-money was outstanding, and they have had the goods. The purchase-money due to the company ought to be paid out of *Taylor & Sons*' purchase-money, the difference only going to *Knight & Son's* trustee.

Winslow, Q.C., and *F. W. Hollams*, for the trustee:—

The contract between the company and *Knight & Son* vested the property in the goods in the latter, and their contract with *Taylor & Sons* passed the property to them. That is a question of intention, and the property was clearly intended to pass. A purchaser has a right to terminate the *transitus* and to get possession of the goods at any point of the voyage; if he obtains possession in fact, there is an end of the *transitus* and of the vendor's right to stop *in transitu*: *Whitehead* v. *Anderson* (6); *Valpy* v. *Gibson* (7). That which took place in the present case was equivalent to a delivery of the goods to *Knight & Son* at *Liverpool*, and a sending of the goods on a new *transitus*. The signing of the bill of lading by the ship's master in favour of *Taylor & Sons* was a complete attornment. If the master attorns to a new purchaser, how can it be said that the goods are still in transit between the vendor and the original purchaser? It is equivalent to the case of a carrier agreeing to hold goods for the purchaser, not as carrier, but in another capacity. In *Lickbarrow*

(1) 11 Ch. D. 68.
(2) 5 B. & Ad. 817.
(3) 6 Beav. 376.
(4) Law Rep. 4 Eq. 481; Ibid. 3 Ch. 588.
(5) Ibid. 6 Eq. 44.
(6) 9 M. & W. 518.
(7) 4 C. B. 837.

v. *Mason* (1), Mr. Justice *Buller* says distinctly that the right of stopping goods *in transitu* exists only as between vendor and vendee, *i.e.*, as he explains it, between the two parties to a particular contract. *Hawes* v. *Watson* (2) illustrates this distinction. There a wharfinger had acknowledged that he held goods as agent for a sub-purchaser, and it was held that this defeated the vendor's right to stop *in transitu*. That applies to the present case; possession was in effect taken by *Knight & Son*, and they in effect delivered the goods to *Taylor & Sons*.

At any rate, that which is now claimed would be a great extension of the doctrine of *Spalding* v. *Ruding* (3). The rights of a sub-purchaser are much more extensive than those of a mere mortgagee or pledgee. *Taylor & Sons* might have entered into contracts for the resale of the goods.

JAMES, L.J.:—

It appears to me that the principle upon which this case can be decided may be expressed in a very few words. I confess that I differ from the judgment of the Registrar. There is no doubt that the right of a vendor to stop *in transitu* exists so long as the *transitus* is not at an end, and as a general rule the mere sale of goods while they are *in transitu* does not determine the *transitus*. That seems to me to be quite settled by the cases. A mere transfer of a bill of lading, or any other sale of the goods, though it transfers the whole property in the goods, does not determine the *transitus*. And it seems to me that the goods now in question were clearly *in transitu* at the time when the transaction took place between *Knight & Son* and *Taylor & Sons*. They left the vendors' warehouse for the purpose of their being put on board a ship which was to deliver them in *New York*. That *transitus* was never altered and never ceased, because the goods have since been delivered in *New York* accordingly. There was a *transitus* continuing from the vendors' warehouse to *New York*. No doubt in the meantime there was a transaction between *Knight & Son* and *Taylor & Sons*, by which there was an

(1) Sm. L. C. 8th Ed. vol. i. p. 802. (2) 2 B. & C. 540.
(3) 6 Beav. 376.

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actual transfer of the property to *Taylor & Sons*. Assuming that there was a complete transfer to *Taylor & Sons* of that same right of property and right of possession which *Knight & Son* had, and no new possession was taken either by *Knight & Son* or *Taylor & Sons* (that is no actual possession by reason of the transfer), it was a mere transfer of the property and the right of possession. The point has been the subject of decision over and over again, and the rule seems to me to have been most accurately expressed by Mr. Justice *Best* in *Hawes* v. *Watson* (1). He says (2): "It appears to me too that if we consider the principle upon which the right of stoppage *in transitu* is founded, it cannot extend to such a case as the present. The vendee has the legal right to the goods the moment the contract is executed, but there still exists in the vendor an equitable right to stop them *in transitu*, which he may exercise at any time before the goods get actually into the possession of the vendee, provided the exercise of that right does not interfere with the rights of third persons." The fact that in that case the third person had not only bought the goods, but had paid the price, was taken into consideration by the Judges, though I do not think Mr. Justice *Holroyd* referred to it in his judgment, but it was considered a material part of the facts which gave the equity to the third person. It has been decided on the same principle that if the transaction with the third party amounted only to a mortgage, and you can give effect to the equitable right of the mortgagee, you do so, and effect is given to the equitable right of the vendor to stop *in transitu*, subject to the intermediate equitable right of the mortgagee. It appears to me impossible to distinguish the case of a mortgagee from that of an actual purchaser of goods; each of them is equally entitled to have his rights respected in the transaction. In my opinion, on the facts of the present case, full effect can be given to the right of the vendors to stop *in transitu*, without in the slightest degree affecting any right or equity of *Taylor & Sons*, because it does not prevent *Taylor & Sons* from getting the goods in performance of the contract into which they had entered, upon their paying their purchase-money, and the only question is whether the money which they gave for the goods is to be subject to the stoppage *in*

(1) 2 B. & C. 540. (2) 2 B. & C. 545.

transitu. I cannot distinguish the case from that of a mortgagee. If surplus moneys remain in the hands of a mortgagee, all he gets is satisfaction of his mortgage. If he sells the goods and pays himself, and there is a balance in his hands, he must account for it. In the one case the balance will be held subject to the right of the vendor to stop *in transitu;* in the other case the whole purchase-money will be equally subject to that right to the extent of the purchase-money due to the vendor. There might be a great difference between the purchase-money payable by the vendee and that which is payable by the sub-vendee, though in the present case there is not much difference. But to the extent of the difference the surplus money will go to *Knight & Son's* trustee, and the rest of the money will go to the vendors, to give effect to their equitable right of resuming possession of the goods by means of a stoppage *in transitu*. I think that the appeal ought to be allowed.

BAGGALLAY, L.J.:—

I am of the same opinion. I entertained some doubts during the progress of the argument, but they were removed when I came more fully to appreciate all the facts of the case. I am satisfied, now that the facts are clearly before us, that it is a case in which the right of stoppage *in transitu* remained. I may say that at one time I was pressed with the consideration that the form in which the bill of lading was made out was equivalent to there having been a delivery of the goods to *Knight & Son*, and then an indorsement of the bill of lading by them to *Taylor & Co.*, and that that would have determined the *transitus*, but I am satisfied upon further consideration that that is not the true view of the case.

COTTON, L.J.:—

We have to consider a case which is perhaps, to some extent, new as regards the right of stoppage *in transitu*. Now of course that right only exists during the transit. If it can be shewn by any means that the transit is at an end, then that right is gone, and there would be no occasion to consider how far the right is interfered with or defeated by the claims or rights of third

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persons. I will first deal with the point whether, in this case, the transit was at an end when the notice was given.

As I understand it, the transit in such cases is while the goods are in the hands of a carrier for the purposes of the journey indicated under or by the contract between the original vendor and purchaser. That, I take it, is the meaning of the transit. When we look into the facts what we find is this, that as between the original vendors, *Golding Davis & Co., Limited,* and the original purchasers, *Knight & Son, Knight & Son* gave directions, as they had a right to do, that the goods should be sent to *Liverpool* to be shipped on board a ship, which they named, for *New York.* The voyage, therefore, from the warehouse or works of *Golding Davis & Co.,* to *New York,* was the journey or transit agreed upon or pointed out by the contract between the original vendors and the original purchasers. What we have to consider is whether, at the time when the right of stoppage was attempted to be exercised, the goods were on that transit.

It is undoubted that the transit might be put an end to by the purchaser who has the property in and the right to claim possession of the goods. But in the present case the goods were in the ship, where the shipowner and the captain were acting simply (subject to what I shall presently consider) as carriers for the purpose of completing the journey which had been indicated as between the vendors and the purchasers. But it is said (and that seems to have been the view of the Registrar) that the transit as between the original vendors and purchasers was ended. Now that must mean that there had been either a taking possession of the goods by the purchasers, or a sending of the goods on a new and different voyage, because, if it only means that when the goods should arrive at their destination they would, under the circumstances existing at the time when the attempt was made to exercise the right to stop, go, not to the original purchaser, but to somebody else, that is the case whenever the original purchaser has handed over the right to receive the goods at the end of the voyage to somebody else. That would include every case of a transfer of a bill of lading. But it is clear that the transfer of a bill of lading, except for value, will never defeat the right of stoppage *in transitu,* and will never put an end to the transit by

making the journey not a journey as between the vendor and the original purchaser, but a journey as between the vendor and somebody else. The real fact in the present case was that the original purchasers, *Knight & Son*, had entered into another contract, not to sell these particular goods, but a contract which they intended to supplement and make good by means of the goods which they would acquire under their contract with *Golding Davis & Co.* No doubt *New York* was the end of the journey indicated in the contract between *Knight & Son* and *Taylor & Son*, but it did not on that account cease to be, and it was not on that account a bit the less the end of the journey contemplated as between *Golding Davis & Co.* and *Knight & Son.* The view which the Registrar took cannot, in my opinion, be maintained. The journey indicated by the contract between the original vendors and purchasers was still continuing, there had been no new or different journey, indicated, and that entirely distinguishes the case from that which possibly was in the mind of the Registrar, where on the original purchase one journey had been contemplated, but in consequence of a contract between the original purchaser and the sub-purchaser he directs that the goods shall go to a different terminus. In such a case, of course the right of stoppage *in transitu* is at an end, because what is done is equivalent to the original purchaser taking possession of the goods and dealing with them by means of that possession. It was urged by Mr. *Winslow* that what occurred in the present case was equivalent to that, but, in my opinion, that view cannot be sustained. I think that what was done had just the same legal effect as if the bill of lading had been made out in the name of the original purchasers and had then been assigned by them to their sub-purchasers. There was nothing done by the purchasers to alter the destination agreed upon between them and the original vendors, no actual taking possession of the goods, and, in my opinion, there was nothing which can be considered as equivalent to their doing that, and then starting the goods as from their possession on a different and new voyage.

Then, the *transitus* being still existing, and there being a right in the vendors to stop, unless something had interfered with that right, can it be said that the sub-sale has interfered with it? Now, I take it the principle is this, that the vendor cannot

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exercise his right to stop during the transit, if the interests or rights of any other persons which they have acquired for value will be defeated by his so doing. Except so far as it is necessary to give effect to interests which other persons have acquired for value, the vendor can exercise his right to stop *in transitu*. It has been decided that he can do so when the original purchaser has dealt with the goods by way of pledge. Here we have rather the converse of that case. There has been an absolute sale of the goods by the original purchaser, but the purchase-money has not been paid. Can the vendor make effectual his right of stoppage *in transitu* without defeating in any way the interest of the sub-purchaser? In my opinion he can. He can say, I claim a right to retain my vendor's lien. I will not defeat the right of the sub-purchaser, but what I claim is to defeat the right of the purchaser from me, that is, to intercept the purchase-money which he will get, so far as is necessary to pay me. That, in my opinion, he is entitled to do, not in any way thereby interfering with the rights of the sub-purchaser, but only, as against his own vendee, asserting his right to resume his vendor's lien and to obtain payment by means of an exercise of that right; interfering only with what would have been a benefit to the vendee, who would otherwise have got his purchase-money without paying for the goods, but in no way interfering with any right acquired by the sub-purchaser of the goods.

Appeal allowed. Appellants to receive the whole of the purchase-money due under their contract with *Knight & Son* out of the fund in the joint names.

Solicitors for Appellants: *Brook & Chapman*, agents for *Goffey & North, Liverpool.*

Solicitors for Trustee: *Hollams, Son, & Coward.*

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Jan. 27;
Feb. 9, 14.

[1877 M. 275.]

Mortgage—Consolidation—Parties—Redemption Suit—Trustees—Rules of Court, 1875, *Order* XVI., *r.* 7.

The rule that the mortgagee of two estates belonging to the same mortgagor may consolidate them so that one cannot be redeemed without the other, does not apply to a case in which one of the mortgages was created subsequently to the assignment of the equity of redemption to the person seeking to redeem.

Tassell v. *Smith* (1) not followed.

In a suit for redemption, bare trustees of the equity of redemption sufficiently represent the trust estate, without the presence of the persons beneficially interested under Order XVI., r. 7.

Goldsmid v. *Stonehewer* (2) distinguished.

The decision of *Bacon*, V.C., reversed.

Where mortgages of two different properties had been made by the same mortgagor at different dates, and the mortgages had been consolidated by a mortgagee, and the mortgagor had conveyed the equities of redemption to different purchasers, the equity of redemption of the second mortgage being conveyed before the equity of redemption of the first mortgage.

Held, in an action for redemption by the owner of the equity of redemption of the second mortgage, that he was entitled to the first right of redemption of both mortgages.

THIS action was brought by *John Mills*, since deceased, and *Edwin Jordan*, against *John Jennings*, to redeem a mortgage and further charge on certain copyhold property at *Cheltenham*, comprising the *Calcutta Inn* and several cottages, under the following circumstances:—

On the 6th of October, 1836, *Thomas Tale* surrendered the above-mentioned property to the use of *John Merrett*, by way of mortgage for securing £500 and interest, and on the 6th of December, 1837, he charged the same property with a further sum of £250.

On the 3rd of December, 1838, *Thomas Tale* settled the equity of redemption of two cottages, part of the above-mentioned premises, on the occasion of the marriage of his daughter, and conveyed the same to trustees upon the trusts of the settlement. The Plaintiffs were the present trustees of the settlement.

(1) 2 De G. & J. 713. (2) 9 Hare, App. xxxviii.

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On the 21st of December, 1857, *J. Merrett* died, and his devisees transferred the mortgage and further charge to the Defendant, *J. Jennings.*

In March, 1858, default having been made in payment of the interest, the Defendant entered into possession of the mortgaged property, and remained in possession till the commencement of the present action, which was in August, 1877.

The Plaintiffs asked for an account against the Defendant, as mortgagee in possession, and claimed the right to redeem the mortgaged premises.

The Defendant put in a statement of defence, in which he stated the following facts:—

By indentures of the 26th and 27th of August, 1834, *Thomas Tale* mortgaged certain freehold land in *Cheltenham* to *R. Middleton* for £300, and on the 27th of February, 1836, he charged it with a further sum of £200.

On the 16th of December, 1836, *Thomas Tale* charged the same premises, and also the property comprised in *Merrett's* mortgage, with a further sum of £1000 due to *Middleton.*

On the 28th of February, 1842, these mortgage securities were transferred to *John Tale,* and ultimately became vested in the Defendant, who denied that he had any knowledge of the Plaintiffs' settlement till the commencement of the action.

On the 30th of October, 1839, subsequently to the date of the Plaintiffs' settlement, *T. Tale* surrendered a piece of copyhold land in *Union Street, Cheltenham,* to the use of *John Tale,* for securing £400 and interest. The equitable interest in this mortgage had become vested in the Defendant, but the property had never been surrendered to him.

The Defendant claimed to consolidate the mortgage securities of the freehold land comprised in *Middleton's* mortgage, and also the mortgage of the *Union Street* property with *Merrett's* mortgage, so that the latter might not be redeemed without redeeming the others.

He also objected that the persons entitled to the equity of redemption of the *Middleton* and *Union Street* mortgages were not parties to the action.

The action was tried on the 5th of November, 1878, before Vice-Chancellor *Bacon.* The surviving Plaintiff did not dispute

the right of the Defendant to consolidate *Middleton's* mortgage with *Merrett's* mortgage, but he denied his right to consolidate the *Union Street* mortgage, which was subsequent in date to the Plaintiff's settlement. The Vice-Chancellor held that the action could not proceed in the absence of the persons interested in the equity of redemption of the mortgages sought to be consolidated, and ordered the action to stand over, with liberty to the Plaintiff to amend by adding parties; and his Lordship declined to give any opinion as to the right of the Defendant to consolidate the *Union Street* mortgage, until the persons entitled to the equity of redemption were made parties.

The Plaintiff accordingly amended his statement of claim by stating that by an indenture dated the 6th of May, 1868, *T. Tale* conveyed the equity of redemption in the property subject to *Merrett's* mortgage, except the two settled cottages, and the *Middleton* mortgage to *W. Maule* (since deceased) and *William Price*, and then added *Price* as a Defendant to the action. But he did not add as parties the persons entitled to the equity of redemption in the *Union Street* mortgage.

It appeared by the deed of conveyance of the 6th of May, 1868, that *Maule* and *Price* were bare trustees of the property for other persons not before the Court.

The Defendant set up an alleged deed of the 8th of October, 1845, by which *T. Tale* was expressed to assign the equity of redemption in the premises comprised in the *Middleton* and *Union Street* mortgages to a trustee for *George Tale*, who was not a party to the action. But the Plaintiff denied that such a deed had ever been executed by *T. Tale*.

On the 2nd of April, 1879, the action came on again before Vice-Chancellor *Bacon*, when his Lordship held upon the evidence, that the deed of the 8th of October, 1845 had been executed by *T. Tale*, and therefore that the parties entitled to the equity of redemption of the *Middleton* and *Union Street* mortgages were not before the Court. As, therefore, the order of the 5th of November, 1878, had not been complied with, his Lordship dismissed the action with costs.

From this decision the Plaintiff appealed. The appeal came on for hearing on the 27th of January, 1880.

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The first question that was argued on the appeal was whether the assignment of the equity of redemption of the mortgaged property by the deed of the 8th of October, 1845, was executed by *T. Tale.* This was asserted by the Defendant but denied by the Plaintiff.

THE COURT decided that the evidence shewed that the alleged deed was never executed.

It was then objected by the Defendant that the deed of the 6th of May, 1868, by which the equity of redemption of part of the *Merrett* mortgage and of the *Middleton* mortgage was assigned to *Maule* and *Price,* was not executed by *T. Tale.*

THE COURT held, on the evidence, that the deed was duly executed.

It was next objected on the part of the Defendant that the Plaintiff and *J. Price* being bare trustees did not sufficiently represent the persons interested in the equity of redemption.

Sir *H. Jackson,* Q.C., and *Townsend,* for the Defendant:—

Order XVI., r. 7, under which trustees, executors, and administrators may sue and be sued as representing the property of which they are trustees or representatives, is only a repetition of the 9th rule of sect. 42 of the 15 & 16 Vict. c. 86. Under that Act it has been held that trustees do not represent their *cestuis que trust* in suits for the redemption or foreclosure of mortgages: *Goldsmid* v. *Stonehewer* (1); *Fisher* on Mortgages (2). It may be different in the case of executors or trustees who have funds available for the purpose of redemption, but the trustees in the present case are admitted to have no such powers. This interpretation of the rule is founded on reason, for it would be very hard if an estate were lost to the *cestuis que trust* in their absence by the inability of their trustee to redeem.

North, Q.C., and *Millar,* for the Plaintiff.

The limitation of the rule referred to only applies to suits for

(1) 9 Hare, App. xxxviii. 17 Jun 1899. (2) 3rd Ed. p. 909.

foreclosure. It has no application to cases like the present, where the Plaintiffs offer to redeem. The trustees would sufficiently represent their *cestuis que trust* under the clause in the former Act, but still more so under the *Judicature Act*, by which trustees and executors are put on the same footing: *Simpson* v. *Denny* (1).

THE COURT reserved the question, and directed the argument to proceed on the remaining points.

North, Q.C., and *Millar*, for the Plaintiff:—

The main question now remains, whether the Defendant has a right to consolidate the *Union Street* mortgage with his other mortgages. We contend that he has not, because it was made subsequently to the date of the settlement of the equity of redemption under which we claim. The principle upon which a mortgagee is entitled to consolidation as against the purchaser of an equity of redemption is that the purchaser is bound by the same equities as the original mortgagor, and he is able to make inquiries and ascertain what those equities are: *Vint* v. *Padget* (2). But that can only apply to equities which exist at the time of the transfer. How can he be bound by anything which the mortgagor may think fit to do with his other estates after the purchase is completed, and which it is impossible for the purchaser to know anything about? The decision of the Court of Appeal in *Tassell* v. *Smith* (3) is cited as conclusive against us. But that case was decided on the special circumstances, and in *Baker* v. *Gray* (4) Vice-Chancellor *Hall* declined to consider it an authority for the proposition that consolidation could be claimed in the case of a mortgage which did not exist when the purchase of the equity of redemption took place. If that case went to that extent it was contrary to the previous authorities and ought not to be followed: *White* v. *Hillacre* (5); *Titley* v. *Davies* (6).

If the Court should be of opinion that the Defendant is entitled to consolidate the *Union Street* mortgage with the others, it does

(1) 10 Ch. D. 28.
(2) 3 De G. & J. 611.
(3) 2 De G. & J. 713.
(4) 1 Ch. D. 491.
(5) 3 Y. & C. Ex. 597.
(6) 2 Y. & C. Ch. 399, n.

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not follow that the owners of the equity of redemption of that property must be parties to the suit. If the Defendant is entitled to have the *Union Street* mortgage paid off, we will pay him off, and we shall stand in his place and take a transfer of his mortgage: *Cracknall* v. *Janson* (1). That will not injure the mortgagors, whoever they may be.

Sir. *H. Jackson*, Q.C., and *Townsend*, for the Defendant:—

A mortgagee of two estates has a right to consolidate them as against a purchaser of the equity of redemption of either of them, whether the other mortgage be prior or subsequent to his purchase. That was distinctly decided in *Tassell* v. *Smith* (2), which was followed by *Beevor* v. *Luck* (3). In the latter case Lord *Hatherley*, then Vice-Chancellor, practically overruled *White* v. *Hillacre* (4). If a man takes a conveyance or a security without getting the legal estate, he takes it with notice not only that certain equities exist, but others may arise affecting the estate: *Ireson* v. *Denn* (5). In *Baker* v. *Gray* (6) Vice-Chancellor *Hall* recognised *Tassell* v. *Smith*, but thought it distinguishable. The rights of a mortgagee as to tacking or consolidation are the same whether the suit is for redemption or foreclosure: *Watts* v. *Symes* (7); *Selby* v. *Pomfret* (8).

If the Defendant is entitled to consolidate the *Union Street* mortgage, the Plaintiff cannot have a decree unless the mortgagors are made parties. How can the account be taken of what is done to the Defendant in the absence of the mortgagors? *Cholmondeley* v. *Clinton* (9). The Plaintiff has no right to force the Defendant to give him a transfer of his mortgage. He may wish to keep his money invested in the *Union Street* mortgage.

If the Court should hold that the Defendant is not entitled to consolidate the *Union Street*, but only the *Middleton* mortgage, the *Middleton* mortgage being the first in date must be first redeemed. Therefore *Price* must first redeem, and if he cannot

(1) 11 Ch. D. 1, 16.
(2) 2 De G. & J. 713.
(3) Law Rep. 4 Eq. 537.
(4) 3 Y. & C. Ex. 597.
(5) 2 Cox, 425.
(6) 1 Ch. D. 491.
(7) 1 D. M. & G. 240.
(8) 7 Jur. (N.S.) 835.
(9) 2 Jac. & W. 1.

do so, as is probable, he being only a trustee, his mortgage will be foreclosed: *Beevor* v. *Luck* (1); *Pemberton* on Decrees (2).

Feb. 14. COTTON, L.J., now delivered the judgment of the Court (*James*, *Baggallay*, and *Cotton*, L.JJ.) as follows:—

The Plaintiff in this case is the surviving trustee of a settlement executed in the year 1838 by one *Thomas Tale* of certain copyhold property. At the time of the execution of the settlement the property was in mortgage, and the settlor had also previously executed mortgages on other property belonging to him, and these mortgages at the time of the commencement of the action were vested in the Defendant *Jennings*. *Thomas Tale* had also subsequently to the date of the settlement, viz., in the year 1839, mortgaged to one *John Tale* another property called the *Union Street* property. The Plaintiff brought his action to redeem the mortgage of the settled estate, and *William Jennings*, who was originally the sole Defendant, claimed as against the Plaintiff to consolidate all the mortgages so vested in him, that is to say, claimed that the Plaintiff should not be at liberty to redeem one of the mortgaged properties unless he also paid what was due on all the mortgages, including that on the *Union Street* property, and contended that the parties entitled to the equity of redemption in all the properties must be brought before the Court.

At the first hearing before the Vice-Chancellor, the case was ordered to stand over, with liberty, or directions, to the Plaintiff to add parties. The Plaintiff amended his bill by making as Defendant thereto one *John Price*, as the person having vested in him the equity of redemption of all the mortgaged properties other than the settled estate and the *Union Street* property. When the case came again before the Vice-Chancellor, he was of opinion that as it was contended that the Defendant *Jennings* was, as against the Plaintiff, entitled to consolidate the mortgage on the *Union Street* property as well as the mortgages on the other properties, the parties entitled to the equity of redemption of the *Union Street* property were necessary parties to the

(1) Law Rep. 4 Eq. 537. (2) Page 478.

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suit, and as the Plaintiff had not made them parties, and was not willing to make them parties, he dismissed the action.

The Plaintiff before us did not contest the right of the Defendant *Jennings* to consolidate all the mortgages other than that on the *Union Street* property. The principal question before us was whether that Defendant was entitled to require the Plaintiff to redeem the *Union Street* mortgage.

The rule as to consolidation of mortgages in its simplest form is this, that where one person has vested in himself by way of mortgage two estates the property of the same mortgagor, one of these cannot be redeemed without the other, and this is so whether the two mortgages were originally granted to the same mortgagee or, having been originally vested in different persons, have by assignment become vested in the same person. This was on the equitable principle that a Court of Equity would not assist a mortgagor in getting back one of his estates unless he paid all that was due, though secured on a different estate. The mortgagor was coming into a Court of Equity to obtain its assistance in getting back an estate which at law belonged to the mortgagee, and it was held to be inequitable to allow him to get back an estate of more value than the debt charged on it, and to leave the mortgagee with an estate charged with a debt due by the mortgagor which might be of larger amount than the value of the estate. But even the rule in this its simplest form was doubted by Lord *Hardwicke* in the year 1750, as appears by the report of *Ex parte King* (1), though he afterwards recognised and adopted it. Moreover, as a mortgagor cannot be allowed to prejudice the rights of his mortgagee by any dealings with the equity of redemption of the estate in mortgage, it has been held that a purchaser or mortgagee of one of two estates already in mortgage is, as regards the consolidation of the mortgages, in the same position as the original mortgagor—that is to say, the purchaser of an equity takes subject to all the equities affecting the person through whom he claims. It is in this case contended that this will apply even though one of the mortgages which it is sought to consolidate was not created till after the mortgagor had sold the equity of redemption of the estate owned by the person claiming to redeem. In our opinion,

(1) 1 Atk. 300.

independently of authority, this contention cannot prevail. It seeks to affect in equity, and by virtue of a rule the creation of equity, the right of a purchaser by the subsequent act of his vendor. That this will be the result will appear from considering from what acts of the purchaser the right of consolidation arises. It is the circumstance of the mortgagor having created two mortgages on two different estates which gives the mortgagee of either estate as soon as the second mortgage is created a right to get both the mortgages into his hands, and to hold both till the debt due on each is paid: The principle which allows as against a subsequent purchaser or mortgagee the right of consolidation is that the mortgagor cannot by any dealing with the equity of redemption prejudice the rights of his mortgagee. This can only apply to rights already given or arising from acts already done by the mortgagor. The same principle will prevent the mortgagor from throwing a greater burden on the purchaser of his equity of redemption by any act done subsequently to the sale or mortgage of this estate. It is true that a mortgagee of one estate may get in and consolidate the mortgage on another estate against a purchaser of the equity of redemption of one of the estates, even though at the time of the purchase the two mortgages were vested in different persons, provided both the mortgages existed previously to the sale of the equity of redemption of one of the estates. But this equity arises out of acts done by the vendor of the equity of redemption previously to the sale; and the act after the sale necessary to give effect to the right of consolidation—namely, the union of the mortgages on both estates in one person—is an act of persons who are no parties to the sale of the equity of redemption and not bound to the purchaser by any contract inconsistent with the claim to consolidate. In our opinion, the purchaser of an equity of redemption takes subject to such equities as arise from acts previously done by his vendor. He is subject to these equities, though acts of persons other than the vendor may be necessary to give rise to the equity. But in our opinion he is not subject to any equity arising from acts done by his vendor subsequently to the sale, and therefore as against a purchaser of an equity of redemption of an estate there can be no consolidation of a mortgage subsequently created on another estate.

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This is our opinion independently of authority. But it is said that *Tassell* v. *Smith* (1) is an authority the other way. The reasons given by the learned Judges who decided that case are very short, and there may have been special circumstances which influenced their judgment; but, in our opinion, that case as reported is an authority in favour of the Defendant's contention. We think the real question is whether we ought to follow that decision. It was urged that, independently of the high authority of the Judges who decided that case, it was a case as to the law of real property, and ought not to be disturbed. But it is not a decision on which the titles to real estates depend. Even if *Tassell* v. *Smith* has been in practice followed, no title will be rendered bad by a decision overruling that case. With the exception of the case now under appeal none has been quoted to us in which *Tassell* v. *Smith* has been followed. But in *Baker* v. *Gray* (2) Vice-Chancellor *Hall*, whose experience in conveyancing makes his opinion on such a point of great value, though he felt himself bound by the decision, disapproved the principle on which, in our opinion, the judgment, as reported, is based, namely, that a subsequent mortgage can be consolidated as against a purchaser of an equity of redemption. With all respect for the Lords Justices who decided that case, we think they did not sufficiently consider that they were allowing a subsequent act of a vendor to defeat the right acquired by the purchaser from him. The principle laid down by their judgment would enable any settlor or vendor of an equity of redemption to throw a burden on those interested under the settlement or purchase, and practically to defeat the settlement or sale by a subsequent mortgage of an entirely different estate to secure a sum far beyond its value, which the mortgagee would be induced to advance in reliance on his right to consolidate it with the mortgage of which the equity of redemption had been settled or sold. As a rule, this Court ought to treat the decisions of the Court of Appeal in Chancery as binding authorities, but we are at liberty not to do so where there is a sufficient reason for overruling them. As the decision in *Tassell* v. *Smith* may lead to consequences so serious, we think that we are at liberty to reconsider and review the decision in that case as if it were being re-heard in the old Court of Appeal in

(1) 2 De G. & J. 718. (2) 1 Ch. D. 491.

Chancery, as was not uncommon. In our opinion, the principle on which the rule as to consolidation of securities is based was misapplied, and, to some extent, departed from in that case. We therefore decline to follow that decision so far as it authorizes a subsequent mortgage effected by a vendor to be consolidated as against a purchaser from him of the equity of redemption of another estate.

Before leaving this part of the case we ought to mention an argument of Sir *H. Jackson* that the Court cannot dispose of the question whether the Defendant *Jennings* can, as against the Plaintiff, consolidate the *Union Street* mortgage without having before it the parties interested in the equity of redemption of that property. The Defendant *Jennings* by his contention seeks to throw a larger burden on the Plaintiff, but not on the owners of this equity of redemption, and in our opinion the Court ought not to require persons to be present in order to argue whether the law is such that they ought or ought not to be parties when, as here, it has before it the parties interested in the point on which that question depends.

This further question was argued on behalf of the Defendant *Jennings*, namely, that even if that Defendant is not entitled as against the Plaintiff to consolidate the *Union Street* mortgage, neither the Plaintiff nor the Defendant *Price* sufficiently represents the parties interested under the settlement of which they respectively are trustees. Under Order XVI., rule 7, trustees may, both as Plaintiffs and Defendants, sufficiently represent the trust estate without any of the parties beneficially interested being before the Court, with power nevertheless for the Court or a Judge to direct any of such last-mentioned persons to be made parties. But this rule is in substance a repetition of rule 9, sect. 42, of the *Chancery Act*, 1852; and it was argued that, in suits relating to mortgages, it had been held, as in *Goldsmid* v. *Stonehewer* (1), that trustees did not sufficiently represent their adult *cestuis que trust* unless it was probable that the trustee, from being executor or otherwise, had funds in hand sufficient to enable him to redeem. But that case was a suit for foreclosure, in which the trustee was a defendant whom the plaintiff sought to foreclose; and there is a reason

(1) 9 Hare, App. xxxviii. 17 Jan 1881.

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in such a case for not giving the plaintiff the relief he seeks unless he brings before the Court all those interested in the equity of redemption who may probably have the means of redeeming the mortgage. Here the Plaintiff trustee is seeking to redeem, and the dismissal of his bill will be effectual in favour of the Defendant *Jennings*, so as to prevent any further proceedings for redemption in respect of the property vested in the Plaintiff as trustee. Moreover, as between the Plaintiff and *Jennings*, the only decree will be that the Plaintiff redeem such mortgage as *Jennings* is entitled to consolidate, and that in default his action be dismissed; and the Defendant *Price* sufficiently represents all parties interested in the estate of which he is trustee for the purpose of being bound by any accounts of the Defendant *Jennings* which must be taken in order to work out the decree between that Defendant and the Plaintiff, and *Price* does not suggest that, as between himself and the Plaintiff, he does not sufficiently represent the persons for whom he is trustee. In our opinion, therefore, the objection that the Plaintiff and *Price* do not sufficiently represent the estates of which they are trustees cannot prevail.

The result is that the judgment of the Vice-Chancellor dismissing the action was erroneous, and the order appealed from must be discharged.

With respect to the form of the judgment,

COTTON, L.J., said:—

We have considered the case of *Beevor* v. *Luck* (1), which was cited by Sir *H. Jackson*. It is no authority for the proposition that *Price*, as the owner of the equity of redemption of the estate first mortgaged, is entitled to the first right of redemption of the two estates. That was a suit for foreclosure. The Plaintiff is entitled to the first right of redemption of both estates, and in default he will be foreclosed, and then *Price* will have a right to redeem or be foreclosed in the same manner.

Solicitors: *Waterhouse & Winterbotham*, agents for *Winterbotham, Bell, & Winterbothams, Cheltenham; Bischoff, Bompas, & Co.*

(1) Law Rep. 4 Eq. 517.

SMITH *v.* DAY.

C. A.
1880
Feb. 18.

[1879 S. 482.]

Injunction—Undertaking—Pulling down Buildings.

An order having been made restraining the Defendant from proceeding with certain buildings, he appealed, offering an undertaking to abide by any order the Court might make at the hearing as to pulling down or altering any buildings erected by him. The Court of Appeal being of opinion that the right to an interlocutory injunction was not established, discharged the order, taking from the Defendant an undertaking in the terms of his offer :—

But *held*, that, without any undertaking, the Court would have jurisdiction at the trial to order the pulling down of any buildings erected after the commencement of the action, or after notice had been given to the Defendant that the Plaintiff objected to the building.

IN this case an interlocutory injunction had been granted by Vice-Chancellor *Hall* to restrain the Defendant from continuing the erection of certain buildings which, as the Plaintiffs alleged, would darken ancient lights on their property. The Defendant moved to discharge this order, offering by his notice of appeal to give, if necessary, an undertaking to abide by any order the Court might make at the hearing as to pulling down or altering any buildings or works erected by him. Some additional evidence was filed by the Defendant and read on the hearing of the appeal.

W. Pearson, Q.C., and *Maidlow*, for the Appellant.

Hastings, Q.C., and *Vernon R. Smith*, for the Plaintiffs.

THE COURT held that, taking the fresh evidence into account, the Plaintiffs had not established their right to an interlocutory injunction. After the reasons for that conclusion had been stated,

JESSEL, M.R. :—

The injunction will be discharged, the Defendant giving an undertaking in the terms offered by his notice of appeal. At the same time, I wish to express my decided opinion that, without

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any undertaking, the Court has jurisdiction to order the pulling down anything erected after the commencement of the action, or after notice given to the Defendant that his erecting it is objected to.

JAMES, L.J.:—

I am of the same opinion, and consider that an undertaking is not necessary; but I prefer taking it, because it remains as evidence of a contract entered into by the Defendant with the Court.

COTTON, L.J.:—

I also am of opinion that whatever a Defendant erects after the commencement of the action, or after notice that an action will be brought, is subject to the control of the Court.

Solicitors: *F. & T. Smith & Sons; H. W. Christmas.*

C. A. 1880 *Feb.* 25.

DICKS *v.* BROOKS.

[1877 D. 244.]

Practice—Appeal—Leave to give fresh Evidence—Rules of Court, 1875, *Order* LVIII., *r.* 5.

Where a party wishes to examine fresh witnesses at the hearing of an appeal, he must apply for leave by motion previously to the hearing of the appeal.

Hastie v. *Hastie* (1) only applies to affidavits and documentary evidence.

THE Plaintiffs in this case were the publishers of a weekly periodical called "*Bow Bells.*" The Defendants were the proprietors of the copyright of a print called "*The Huguenot,*" engraved from *Millais*' picture.

The Plaintiffs, in the Christmas number, issued a chromo-printed picture as a pattern for woolwork, which the Defendants contended was an infringement of their copyright in "*The Huguenot.*" They accordingly issued a circular warning the public against the sale

(1) 1 Ch. D. 562.

or purchase of any copy of "*The Huguenot*" without the stamp of their firm.

The Plaintiffs brought an action against them for publishing this circular, claiming damages for slander of their title to the print which they had issued. The Defendants put in a counter-claim against the Plaintiffs, claiming damages for the violation of their copyright.

The Vice-Chancellor was of opinion that the issue of the chromo-print was a violation of the Defendants' copyright, dismissed the original action, and gave judgment for the Defendants on the counter-claim, with damages against the Plaintiffs.

The Plaintiffs appealed from this decision: and, one having died, the survivor now moved for leave to adduce evidence on the appeal which had not been used before the Vice-Chancellor.

He proposed to call a clerk of the *Illustrated London News* to prove that in 1852 a print of "*The Huguenot*" was published in that newspaper, and of other witnesses to prove the sale of prints and photographs of that picture by persons unconnected with the Defendants.

The notice of motion was accompanied by an affidavit by the solicitor of the Plaintiff, the Plaintiff himself being an invalid resident abroad, that he discovered the fresh evidence after the trial of the action, and that it was material to the Plaintiff's case.

Whitehorne, and *Oswald*, for the Plaintiffs, referred to *Gover's Case* (1); *In re Chennell* (2).

Ingham, for the Defendants, submitted that the application was irregular. The Appellant ought to have simply given notice to the Defendants that leave to produce further evidence would be applied for at the hearing of the appeal: *Hastie* v. *Hastie* (3).

JESSEL, M.R.:—

The Court is very careful not to encourage perjury by permitting fresh evidence to be adduced after the trial of the action.

(1) 24 W. R. 36. (2) 8 Ch. D. 492-504.
(3) 1 Ch. D. 562.

C. A. 1880 DICKS v. BROOKS.

But we think this is a proper case for allowing it. With respect to the form of the application, the decision in *Hastie* v. *Hastie* (1) only applies to affidavits and documentary evidence. If witnesses have to be subpœnaed, it is right to apply by motion previously to the hearing of the appeal.

JAMES and COTTON, L.JJ., concurred.

Solicitors: *Crook & Smith; Bowen May.*

C. A. 1879 V.-C. B. *Feb.* 19. C. A. *Dec.* 15, 16, 19.

In re NORRINGTON. BRINDLEY *v.* PARTRIDGE.

[1877 N. 50.]

Administration—Conversion within a Year—Discretion in Executors—Depreciation of Securities—Shares in unlimited Company—Invalid Sale to Trustee—Profits, whether Capital or Income.

Where a testator gives an absolute discretion to his executors to postpone the sale and conversion of his estate, they are not bound by the ordinary rule to convert the property within a year, even though some of the property consists of shares in an unlimited company. Nor will they be liable in the absence of *mala fides* for loss arising to the estate from the non-conversion.

The decision of *Bacon*, V.C., affirmed.

A testator gave all his real and personal property, including a business, to his executors on trust to sell and pay the income to his wife for life, and after her death to the Plaintiff, but with full discretion to his executors to postpone the sale of his estate. And he directed that until the sale the net income should be applied in the same way as the income of the proceeds of the sale was to be applied. Shortly after the death of the testator one of the executors purchased the business at a valuation:—

Held, by *Bacon*, V.C., that the sale must be set aside, and that the executor must account for the profits made since the sale without salary, but with just allowances; and that the amount of the profits must be treated as capital, and that the widow was only entitled to the income of it.

On an appeal the case was compromised, and the purchase was confirmed; but the Court expressed an opinion that if the sale had been set aside the widow would have been entitled to the profits as income.

JOHN NORRINGTON, by his will, dated the 21st of October, 1869, after bequeathing to his wife, the Defendant *Fanny Nor-*

(1) 1 Ch. D. 562.

rington, all his furniture, household effects, and money in his house or at his bankers for her own use, and after bequeathing to his daughter, the Plaintiff *Fanny B. Brindley*, then *Fanny B. Norrington*, the sum of £530, devised and bequeathed all his real and residuary personal estate unto and to the use of the Defendants, *James Partridge* and *W. C. Rafarel*, whom he appointed his executors, their heirs, administrators, and assigns, upon trust, if they should think proper, to sell the same and stand possessed of the money arising therefrom after payment of his funeral and testamentary expenses, debts and legacies, upon trust to pay the annual income thereof unto, or permit the same to be received by, his wife, the Defendant *Fanny Norrington* and her assigns during her life, and after her decease upon trust to pay, convey, and assign the said trust funds unto his said daughter, her heirs, executors, administrators, and assigns, according to the nature thereof respectively. And if his said daughter should not attain the age of twenty-one years, or marry under that age with consent of her mother or guardians, then the said testator devised and bequeathed the said trust funds unto his wife, her heirs, executors, administrators, and assigns absolutely. And the testator declared that his said trustees might invest the trust moneys in their names in the purchase of stocks or funds of *Great Britain*, Bank Stock, *East India* Stock, or of any stock or shares of any railway or other company, whether debenture, preference, or otherwise, or at interest on Government or real or leasehold securities, or on the security of debentures or bonds of any railway or other company, with power from time to time to vary the same stocks, funds, or securities for others of a similar character, such investment and variation to be with the written consent of his wife. And the testator declared that the net income of his real and personal estate until conversion should be applied in the same manner as was directed of the income of the purchase-money. And the testator gave power to his trustees to grant leases of his real estate until it should be sold, and he empowered them to employ in his business, until disposed of with the written consent of his wife, all or any part of the trust funds. And the testator declared that it should be lawful for his trustees to investigate and arrange and settle all accounts and transactions whatsoever between him

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In re NORRINGTON. BRINDLEY *v.* PARTRIDGE.

and any person whomsoever, and to wind up all his affairs, and generally to do and execute all such acts, matters, and things as should appear to his trustees to be necessary or expedient for effecting or facilitating the final settlement of all matters arising out of his business concerns, and that it should be lawful for them at the risk of his estate to sell any part or parts of his personal estate embarked in trade to any person for money or upon credit, and that it should be lawful for his trustees to postpone for such period as they in their free discretion should think fit the sale and conversion into money of all or any part of his real and personal estate, and his trustees should not be responsible for any loss, risk, or damage which might be occasioned by, or which might result from, such postponement.

The testator died on the 14th of February, 1870, and the will was proved by the Defendants *James Partridge* and *W. C. Rafarel.*

The Plaintiff *Fanny B. Norrington*, married the Plaintiff *F. J. Brindley* in October, 1876, and by a settlement made in contemplation of her marriage her interest in her father's will was assigned to the Plaintiffs *P. H. Brindley* and *R. Ashton*, upon the trusts therein declared.

The Defendants the executors and trustees did not sell any part of the real estate of the testator.

The testator was a chemist and druggist at *Barnstaple*, and a few months after his death the Defendant *Partridge* purchased the business for £1400, the sum at which it was valued by another chemist at *Barnstaple*, and continued to carry on the business on his own account.

The testator at the time of his death had shares in the *Barnstaple Gas Company*, the *Barnstaple Water Company*, and the *Lynton Water Company*, and also seventy-five shares in the *West of England Bank*, which was a company of unlimited liability. The executors sold none of these shares, but transferred the gas and water companies' shares into their own names, and deposited the probate of the will with the *West of England Bank*, so as to be enabled to receive the dividends on the shares in that company.

The testator had also certain Egyptian bonds, which the testator permitted Mrs. *Norrington* to hold, in order that she might obtain payment of the coupons as they become due.

In the year 1876 these bonds had considerably fallen in value since the death of the testator, and the executors, fearing that they would fall still more, sold them with the consent of Mrs. *Norrington*. The market value of the bonds did, in fact, fall after the sale.

The action was brought by *Fanny B. Brindley*, her husband, children, and trustees, against the executors and Mrs. *Norrington* for the administration of the testator's estate, and asking that the sale to the Defendant *Partridge* might be set aside, and that the executors might be held accountable for not selling the Egyptian bonds and the *West of England Bank* shares shortly after the death of the testator.

In January, 1879, after the institution of the suit, the *West of England Bank*, which up to that time had been considered a prosperous concern, stopped payment and was wound up.

The action came on for trial before Vice-Chancellor *Bacon* on the 19th of February, 1879.

Sir *H. Jackson*, Q.C., and *C. Herbert Smith*, for the Plaintiff:—

Admitting that the rule in *Howe* v. *Earl of Dartmouth* (1) does not strictly apply, and that a discretion as to retaining the property in the state in which it was left by the testator was given to the executors, they were bound to exercise that discretion fairly and reasonably, after due consideration for the benefit of all persons interested: *Sculthorpe* v. *Tipper* (2); and in any case the *onus* lies on them to shew the sufficiency of the security on which the property is left: *Stretton* v. *Ashmall* (3); *Lewin* on Trusts (4). In this case no discretion has been exercised. The trustees have retained the *West of England Bank* shares, which have become valueless, and they have been guilty of a breach of trust (in which the widow concurred) in retaining these shares, and in allowing the widow to do what she liked with the Egyptian bonds. As those bonds have been sold at a considerable loss, the estate is entitled to credit for the maximum price which they would have produced at any time after the expiration of one year from the testator's death. The widow, who has been favoured at the expense of the estate, is

(1) 7 Ves. 137.
(2) Law Rep. 13 Eq. 232.
(3) 3 Drew. 9.
(4) 7th Ed. p. 299.

C. A. 1879 — *In re* NORRINGTON. BRINDLEY *v.* PARTRIDGE.

entitled, on the footing of *Brown* v. *Gellatly* (1), only to interest at 4 per cent. on the value of the securities at the testator's death, and not to the whole amount of interest which she has received down to the time of conversion. The sale to *Partridge* of the testator's business without charging him anything for goodwill, was a breach of trust and must be set aside.

Horton Smith, Q.C., and *Maidlow*, for the Defendants:—

The operation of the rule in *Howe* v. *Earl of Dartmouth* (2), which is a mere rule of law invented for the testator *ex hypothesi*, has been expressly excluded by the testator, who could not have used more apt words than he has to justify the trustees in postponing conversion, and to give the widow the enjoyment of the property in its actual unconverted state. Slight indications of a contrary intention have been held sufficient to exclude the operation of the rule: *Wrey* v. *Smith* (3); *Pickering* v. *Pickering* (4); *Mackie* v. *Mackie* (5); *Johnston* v. *Moore* (6); *Miller* v. *Miller* (7); *Thursby* v. *Thursby* (8); *Lean* v. *Lean* (9). In *Sculthorpe* v. *Tipper* (10) there was nothing in the will to authorize the trustees to postpone beyond "a reasonable time," *i.e.*, a year from the testator's death, the sale of the shares of which he died possessed; whereas here the testator's intention that the property should remain unconverted until the trustees should think fit to sell is clear on the face of the will. The investments being of a very uncertain and speculative character, the trustees, who admittedly have a discretion as to the time of conversion, will not be made personally responsible for the loss which has arisen from their not having sold within one year from the testator's death: *Marsden* v. *Kent* (11); *Buxton* v. *Buxton* (12).

The Plaintiffs, if they rip up the sale, must do so entirely, if at all; and if the profits are to be brought back for the benefit of the estate, then *Partridge*, under the head of just allowances, is entitled to an allowance for his management of the business:

(1) Law Rep. 2 Ch. 751.
(2) 7 Ves. 137.
(3) 14 Sim. 202.
(4) 4 My. & Cr. 289.
(5) 5 Hare, 70.
(6) 27 L. J. (Ch.) 453.
(7) Law Rep. 13 Eq. 263.
(8) Ibid. 19 Eq. 395.
(9) 23 W. R. 484.
(10) Law Rep. 13 Eq. 232.
(11) 5 Ch. D. 598.
(12) 1 My. & Cr. 80.

Brown v. *De Tastet* (1); *Cook* v. *Collingridge* (2). And if the sale is treated as a nullity, then the widow takes the entire profits made in the business, and the partners are remitted to their rights.

[They also cited *Swinfen* v. *Swinfen* (3); *Arnold* v. *Arnold* (4).]

Sir *H. Jackson*, in reply:—

We claim to set aside the sale to *Partridge*, and to be entitled to the benefit of all profits made in the meantime. As the widow consented to the *de facto* sale, she cannot receive the profits of the business, as if it had not taken place. Nor can the executor named in the will claim any allowance or remuneration for his having carried on the business for the benefit of the estate: *Stocken* v. *Dawson* (5).

Admitting that the trustees are outside *Howe* v. *Earl of Dartmouth* (6), and that the one year rule does not apply, they are not exempt from all liability as to the exercise of their discretion—for this is the contention for the defence—and are not entitled to give the tenant for life the whole benefit at the expense of all other parties interested.

BACON, V.C.:—

This case has been argued at great length and with very copious reference to authorities, none of which, I confess, assist me greatly in deciding the matter before me, because it must be decided on principles which are so well recognised and so incapable of question or contradiction, that anybody who is versed in these matters can deal with it without the assistance which would otherwise be derived from the cases. Now in the course of this discussion the word "discretion" has been very frequently used, and upon it the argument on both sides has a great deal turned. What does it mean? In honest plain language it means "Do as you like." A discretion which is to be actively exercised must be exercised honestly and intelligently, but the discretion which a man chooses to exercise by remaining supine is a duty, if it is a duty, of im-

(1) Jac. 284.
(2) Ibid. 607.
(3) 29 Beav. 207.
(4) 2 My. & K. 365.
(5) 6 Beav. 371.
(6) 7 Ves. 137.

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perfect obligation. If no shadow of suspicion can be brought against him, if no culpable negligence can be alleged against him, what liability does a man in whom the discretion is vested incur by doing nothing? Attention should be paid to the meaning of the word, and the effect of it in the various cases in which its operation is called in question; but when all is said and done, there is one certain distinct guide by which my decision must be regulated, and that is the will of the testator. Now, what is the will of the testator in this case? It is very plain indeed. He begins by giving all his property to trustees, at their discretion to sell and convert; but he does not stop there. Immediately after saying that, he provides for the mode in which investment of the proceeds shall take place if in the exercise of their discretion they turn his property into money. He then makes a provision the effect of which is that it is not only not obligatory upon them to exercise any discretion, but that until the discretion shall be exercised his widow shall be entitled to all that can be derived in the way of rent and profit from his property as it then stands. There can be no doubt about what the testator says, nor can there be any question that the trustees cannot do anything but that which the testator has authorized them to do, which, in other words, is to be assumed to be that which the testator would himself do. What complaint is made against the trustees? Take the case of the Egyptian bonds. There is a certain irregularity, no doubt, in the trustees having parted with the possession of them and placed them in the hands of the widow, for which, if anything had gone wrong, they must have been answerable; but in itself it is less than a venial offence. She was to have them in order that she might cut off the coupons when they became payable, and so deal with them. She did exercise an authority which she did not possess, and did sell them, and the trustees must be answerable for what she did with their knowledge, or, if not with their knowledge, at least by their authority and through their means. And what did she do? At the testator's death these Egyptian bonds, questionable securities at all times, were worth about £80. They underwent great depreciation up to 1877, they were diminishing and continued to diminish in value; they were in a falling market. Could, then, there be anything more discreet on the part of these

trustees, who had that discretion to exercise, than to say, "We will run no risk about this any longer, it is bad enough as it is; it is likely to become worse, and we will turn them into money now?" Where is the breach of trust? Where is the impropriety? Where is the erroneous exercise of the discretion? I am quite at a loss to see any grounds upon which it can be said that the sale of the Egyptian bonds at the time when they were sold was not as prudent an exercise of the active discretion as could be possibly practised by these trustees.

Then, as to the *West of England Bank* shares, the only other shares upon which any question has been raised, for it is admitted that the trustees did no wrong in retaining the gas company's shares and the water company's shares in the way in which they found them at the testator's death. Until a very recent period these *West of England Bank* shares were reputed and believed to be perfectly safe and valuable investments. The trustees lodged the probate of their will with the *West of England Banking Company* for the purpose of establishing a right to receive the dividends which became payable upon these shares. Nobody suggested to them that it would be right to sell them. There was no reason why they should have sold them, no shadow of suspicion against the solvency of the bank, and so they remained and so remain up to this time. But, though not a matter of great importance, it is worthy of observation that the Plaintiffs, keenly alive to their interest, taking out a summons that the balance lodged in the bank might be brought into Court and there made safe, did not at that time express any more doubt than the trustees expressed or felt about the validity and solvency of the *West of England Bank* and the shares that they held in it. They have never become shareholders themselves; they have never operated any sort of conversion. They have dealt with them as the testator in plain words meant, and said expressly that he did mean that they should deal with them, as they thought fit—to be active if necessary, to be passive if they saw no necessity for activity. On that ground, in my opinion, there is no complaint to be made against the trustees. Then comes another question which is as clear the other way. There did come a time when these trustees, armed with the discretion that I have before alluded to, thought it right to put

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that discretion into active operation, and they did sell the business of the testator to Mr. *Partridge*. I pay no attention to the notion that the testator had in his lifetime expressed a desire that *Partridge* should succeed him. Of course that could not, and ought not, to influence the conduct of the trustees in a legal point of view, although very likely it may have had some influence on them all—the two trustees and the widow. But the transaction cannot stand for a moment. Being a thing which is wholly illegal, the sale must of necessity be set aside, except so far as to hold *Partridge* to his bargain of £1400 if upon a re-sale a less sum should be produced. That sale therefore must unquestionably be set aside, and the business of the testator, as a going concern, with the goodwill, if it has any, must now be sold in the administration of his estate. Then, as a necessary consequence, this trustee, who has possessed himself of the trust estate and who has been carrying it on for his own benefit and for his profit, must answer for every shilling of the profit that he has received. The only doubt that I have entertained is as to the question of his having any allowances whatever. *Cook* v. *Collingridge* (1) and *Brown* v. *De Tastet* (2) do recognise that in a going partnership continued by the surviving partner, a claim to some allowance, either in the shape of salary or something like that, may be recognised. There is no such case here, there is no partnership. There is no relation between the parties except the fiduciary relation of trustee and *cestui que trust*, which of itself precludes the possibility of Mr. *Partridge* making a profit by any part of the transactions in which, since the period of the sale, he has been engaged. He will be entitled, notwithstanding the illegality of the transactions, to all just allowances in taking an account of profits, because it would be unreasonable that you should look into his books and find that he had made a sum of profits, without deducting from it the rent of the house in which he carried on his business, the wages of the assistants he employed in the business, and the expenditure he incurred for stock, and so on, things which are perfectly well understood by anybody engaged in taking accounts. To just allowances he is entitled, to salary, in my opinion, he can have no kind of claim. You cannot give salary to

(1) Jac. 607. (2) Jac. 284.

a trustee who is made liable for his irregularity. I do not like to use a harsher expression, for I do not think that there is a suspicion of any improper dealing on the part of anybody in any one of these transactions. But salary he cannot have. The salary, if he has earned any at all, was earned for his own ends and not for the benefit of this trust estate; but for the net profits, making all just allowances, he, in my opinion, is justly accountable, and that account must be taken, and without any other than, as I have said, just allowances. Then, when that sum is ascertained by the inquiry, there will be a sum of money which belongs to the testator's estate, and the widow says, "That is mine, because the testator has said until conversion the profits of that business shall be mine." Taking that as she asserts it, it gives her no title to it as *corpus*. Until conversion the period is settled. It was converted in the year 1870, a few months after the testator's death. She could be entitled to no more than the income of the property then dealt with because the conversion had taken place. She cannot be entitled to the profits. The profits have been unlawfully obtained, and they must be brought back to the testator's estate. It is a damage done to the testator's estate, and the damages come to be a part of the *corpus* of the testator's estate. To interest upon that sum the widow may well be entitled, because she is entitled to all income, but because there has been a breaking of a close or any other trespass which must be compensated for in damages, to say that that consists of income such as the testator meant to give to his wife until the conversion took place, would, in my opinion, be doing violence not only to the words of this will, but to the justice of the case.

I believe I have gone through the several points which have been argued before me, and there must be an administration decree. There has been no account that I know of rendered up to the hearing. I think the account ought to have been rendered at the time it was asked for, and therefore the costs up to the hearing must be paid by the trustees.

From this judgment, so far as it related to the various securities retained unconverted by the Defendants, the Plaintiffs appealed, and the Defendants gave cross notice of appeal from the Vice-

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Chancellor's decision as to the sale of the business to the Defendant *Partridge.*

The appeals came on to be heard on the 15th of December, 1879. The appeal of the Plaintiffs was argued first.

Sir *H. Jackson,* Q.C., and *C. Herbert Smith,* for the Appellants:—

With respect to the Egyptian bonds, we admit that the trustees had a discretion to hold them as long as they thought it beneficial for all parties interested to do so; but our complaint is that they did not exercise any discretion, but allowed the widow to have the control of the bonds, and to do as she pleased with them. The case of the *West of England Bank* shares is different. They were shares in an unlimited company, and it was the duty of the executors, even though the testator gave them a discretion to hold them, to get rid of them as soon as they conveniently could, and to relieve the estate from the liability of them. *Sculthorpe* v. *Tipper* (1) is precisely in point.

Horton Smith, Q.C., and *Maidlow,* for the Defendants, were not called on.

JAMES, L.J.:—

The testator in this case has given to his trustees power to judge for themselves. They were to do what they thought best. The testator had invested his money as he thought best, and he had invested it in certain securities because he thought well of them. And he says in plain language, "I have acted thus in the exercise of my discretion. My executors are to have the same discretion." We should be making a will for the testator if we were to hold them liable for having acted as they have done. The judgment of the Vice-Chancellor must be affirmed on this point.

BAGGALLAY, L.J.:—

I am of the same opinion. It may be a great misfortune that these shares were retained by the trustees, but the acts and the will of the testator are to blame for it. He had invested his pro-

(1) Law Rep. 13 Eq. 232.

perty in these investments, and I cannot doubt that he wished his trustees to retain it in these investments so long as they thought fit. I may add that in *Sculthorpe* v. *Tipper* (1) the testator directed that his property should be sold immediately after his decease or so soon thereafter as the trustees might see fit, shewing that he contemplated their being sold within the ordinary period.

THESIGER, L.J.:—

The words of the will place the matter beyond a doubt. If the testator had wished to limit the discretion of the trustees he should have used language to that effect; but he has used language giving them a discretion in terms absolutely unfettered; and it would be wrong for the Court to impose an artificial rule that, notwithstanding this discretion, the trustees were not to hold any investment which might bring any liability on the estate. I cannot help thinking that the Court ought not to act too strictly on this very artificial rule, which seems to have arisen from an opinion entertained at some remote time of the manner in which testators ought to dispose of their property.

JAMES, L.J.:—

The Court of Chancery laid down an artificial rule for the guidance of trustees for the benefit of families; and from that time every conveyancer for the benefit of families has been using his utmost ingenuity to relieve trustees from the burden so laid upon them.

The cross appeal of the trustees was then heard.

Horton Smith, Q.C., and *Maidlow*, for the Defendants:—

An account of the profits ought not to have been directed. The sale must be either good or bad; if good, *Partridge* is entitled to the profits; if bad, there is no sale at all. The widow is entitled to them, and she waives the account. The Vice-Chancellor treats the sale as good for one purpose and bad for another, which cannot be right. The sale is only set aside conditionally, as in *Ex*

(1) Law Rep. 13 Eq. 232.

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parte Reynolds (1), *Ex parte Hughes* (2); and *Partridge*, if held to his bargain, must have the profits.

Sir *H. Jackson*, Q.C., and *C. Herbert Smith*, for the Plaintiffs:—

We submit that the Vice-Chancellor was right is holding that when a *de facto* sale was made the clause giving the widow profits came to an end.

James, L.J.:—

The case had better stand over for the parties to see whether they cannot agree to affirm the sale upon payment by *Partridge* of a further sum for goodwill, and so put an end to the dispute. The case not having been fully argued out, I do not give a concluded opinion as to the profits, but as at present advised I think that if the sale be affirmed the purchaser takes the profits, and that if it be set aside, the widow is entitled to them, so that the order in its present form cannot be maintained.

Baggallay, L.J.:—

Subject to further argument, I am of the same opinion.

Thesiger, L.J.:—

My view is the same as that of the other members of the Court.

Dec. 19. The case was mentioned again, and by arrangement the sale was affirmed on the terms of *Partridge* paying an additional sum of £150 for the goodwill of the business.

Solicitors: *Rickards, Walker, & Maude*, agents for *Burman & Crompton, Birmingham; Church, Sons, & Clarke*, agents for *J. A. Thorne, Barnstaple.*

(1) 5 Ves. 707. (2) 6 Ves. 617.

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C. A. 1880 Feb. 12.

Bankruptcy—Property of Bankrupt—Defaulter on Stock Exchange—Differences paid by Members of Stock Exchange to Official Assignee—Rights of Defaulter's Trustee in Bankruptcy—Rules of Stock Exchange—Adverse Claims—Payment of Money to wrong Party—Remedy of real Owner.

By the rules of the *London Stock Exchange*, when a member is declared a defaulter, the contracts for the sale and purchase of stocks and shares, which have been made by him for the next settling or account day, are closed by a person, called the official assignee, appointed by that body, at the market prices of the stocks and shares, the subjects of the contracts, at the time of the default, and those members who, on that footing, owe differences upon their contracts with the defaulter are bound by the rules, on pain of being themselves declared defaulters, to pay those differences to the official assignee. And the official assignee is bound by the rules to employ the moneys thus received by him in the first place in paying to those members, to whom, upon the same footing, differences are due upon their contracts with the defaulter, the differences so due to them.

Held, that the moneys thus received by the official assignee, being an artificial fund created by the rules of the *Stock Exchange*, do not form part of the assets of the defaulter, and do not pass to his trustee in bankruptcy.

Tomkins v. *Saffery* (1) distinguished.

Held, also, that, even if the payments made to the official assignee of a defaulter ought to have been made to the trustee in bankruptcy, yet, as the official assignee claimed them adversely, the trustee could not recover them from him.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

George Plumbly was a stockjobber, and a member of the *London Stock Exchange*. On the 25th of June, 1879, he made a declaration to the secretary of the *Stock Exchange* of his inability to meet his engagements, and he was thereupon, in accordance with the rules, publicly declared a defaulter. On the same day he filed a liquidation petition in the *London* Bankruptcy Court, and a receiver of his property was appointed. He had, prior to his failure, entered into various contracts with other members of the *Stock Exchange* for the purchase and sale of stocks and shares, which contracts were to be completed on the 27th of June, which was the next settling or account day. Under the provisions of the rules of the

(1) 3 App. Cas. 213.

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Stock Exchange, all these contracts were closed by the official assignee of that body at the market prices of the stocks and shares respectively at the time of the declaration of default, and those members of the *Stock Exchange* who, on a settlement of their contracts on that footing, owed money on their contracts with *Plumbly*, paid the amounts which they respectively owed to the official assignee, which sums he, according to the rules, was bound to divide amongst those members to whom, on the same footing, moneys were due on their contracts with *Plumbly*.

The receiver gave notice to those members of the *Stock Exchange* from whom in this way differences were due, to pay the sums due from them under the rules to him, on the ground that they formed part of *Plumbly's* estate distributable among his creditors generally in the liquidation, but, notwithstanding this notice, and an injunction which was, on the 4th of July, granted by the Court of Bankruptcy, restraining the official assignee from receiving or collecting any of the assets of the debtor, including debts and balances due from members of the *Stock Exchange*, until after the appointment of a trustee of the debtor's estate, the majority of the members of the *Stock Exchange* paid the moneys due from them under the rules to the official assignee. By the order for the injunction it was also ordered that the amounts collected by the official assignee, and all moneys received or to be received by the receiver from members of the *Stock Exchange*, should be forthwith paid into Court, to abide the decision of the question between the parties.

The sums paid into Court in pursuance of this order amounted to £3956 17*s.* 10*d.* After the appointment of a trustee he applied to the Court for an order declaring that he was entitled to this sum.

The material rules of the *Stock Exchange* were as follows:—

16. "The committee may expel or suspend any member of the *Stock Exchange*, who may violate any of the rules or regulations, or fail to comply with any of the committee's decisions, or who may be guilty of dishonourable or disgraceful conduct. The resolution for expulsion or suspension must be carried by a majority of three-fourths in a committee specially summoned for the purpose, and consisting of not less than twelve members, and must be con-

firmed by a majority of the committee, at a subsequent meeting specially summoned.

50. "The *Stock Exchange* does not recognise in its dealings any other parties than its own members: every bargain, therefore, whether for account of the member effecting it, or for account of a principal, must be fulfilled according to the rules, regulations, and usages of the *Stock Exchange*.

142. "A member unable to fulfil his engagements, shall be publicly declared a defaulter by direction of the chairman, deputy chairman, or any two members of the committee.

143. "A member declared a defaulter in the *Stock Exchange*, or a member who may become bankrupt or insolvent, although he may not be at the same time a defaulter in the *Stock Exchange*, ceases to be a member.

144. "When a member shall give private information to his creditors of his inability to fulfil his engagements, the creditors shall not make any compromise with such defaulter, but shall immediately communicate with the chairman, deputy chairman, or two members of the committee, in order that the member in default may be immediately declared; and in case the committee shall obtain knowledge of any private failure the name of the defaulter shall be publicly declared.

148. "Creditors for differences shall have a prior claim on all differences received by, or due to, a defaulter's estate.

153. "The committee will not permit or recognise any payment or claim on a defaulter's account that does not arise from a Stock Exchange transaction.

156. "A defaulter shall not be eligible for readmission, who shall not have paid from his own resources, independently of his security-money, at least one-third of the balance of any loss that may occur on his transactions, whether on his own account or that of principals; or who, in the event of his debts being less than the amount which his sureties may be called upon to pay, shall not have refunded to the sureties one-third of the amount paid by them.

160. "Non-members shall be allowed an equal participation of assets, subject to the same conditions as members, provided their claims be admitted by the creditors, or in case of dispute by the committee; and a person whose claim is so admitted, may be

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represented at the meeting of creditors by any member whom he may select.

166. "Two or more members shall be appointed annually by the committee, to act as official assignees, whose duty it shall be to obtain from a defaulter his original books of account, and a statement of the sums owing to and by him, to attend meetings of creditors, to summon the defaulter before such meetings; to enter into a strict examination of every account; to investigate any bargains suspected to have been effected at unfair prices; and to manage the estate in conformity with the rules, regulations, and usages of the *Stock Exchange*.

167. "The assignees shall collect and pay the assets to the credit of their joint account at a banker's, and shall distribute the same as soon as possible.

168. "In every case of failure the official assignee shall publicly fix the prices current in the market immediately before the declaration, at which prices all persons having accounts open with the defaulter shall close their transactions by buying of or selling to him such stocks, shares, or other securities as he may have contracted to take or deliver, the differences arising from the defaulter's transactions being paid to or claimed from the official assignees. In the event of a dispute as to the prices named, they shall be fixed by two members of the committee."

A general discretionary power of dispensing with the rules was given to the committee.

An affidavit made by some of the leading members of the *Stock Exchange* explained the practice of that body and the nature of its transactions as follows:

"Transactions on the *Stock Exchange* are entirely between the members, and the names of principals on behalf of whom members do business are never disclosed, although the name of the dealer or broker with whom a broker deals is generally disclosed by such broker to his principal. Every member dealing on the *Stock Exchange* is, by the rules of the House, liable for the due fulfilment of every bargain into which he enters, on pain of being immediately declared a defaulter. Any member becoming a defaulter ceases to be a member of, or capable of dealing on or entering, the *Stock Exchange*.

"Each transaction (apart from loans) is a transaction of purchase and sale. The contract by the selling member is that, on the settling day for which the sale is made, he will hand over stock or shares to the amount sold, on receiving the purchase-money; and similarly the buying member contracts that he will, on such settling day, accept transfer or delivery of the stock or shares purchased by him, and make payment for the same at the price agreed.

"The majority of bargains and transactions on the *Stock Exchange* are made for completion on periodical days, occurring either monthly or bi-monthly according to the stock dealt in, which are called settling days, for the next coming of which settling days by far the larger part of the dealings and transactions are effected.

"Contracts on the *Stock Exchange* are never for payment or receipt of differences. All contracts, bargains, and transactions on the *Stock Exchange* are real transactions for cash, or for a day named, contemplating and compelling the actual transfer or delivery, and the paying for the stock or shares the subject thereof, and which transfer or delivery and payment can only be avoided and rendered unnecessary by a new and equally real bargain, on the one part to accept and pay for on the same day, and, on the other part, to transfer or deliver an equivalent amount of the same stock or shares.

"If after a bargain has been entered into between members, either is for any reason not desirous of taking or delivering the stocks or shares the subjects of the bargain, he sells or buys, as the case may be, a similar amount of (but not the identical) stocks or shares for the same settling day for which the original bargain of purchase or sale was entered into, so as to enable that particular transaction to be balanced and written off, and if he is desirous simply to postpone the completion of the original transaction, not to abandon it entirely, he re-purchases or re-sells a similar amount of (but not the identical) stocks or shares for the subsequent settling day, such sale and re-purchase being generally effected at the making-up price of the day fixed by the orders of the committee of the *Stock Exchange*. The whole amount of stock or shares to be taken and delivered balances itself at all times; but the amount

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of stock to be accepted from or delivered to the several persons with whom any member has dealings is liable to vary with every new transaction entered into. A person credited for stock on one day may be debited as the result of a new bargain on the next. Or all the transactions of purchase and sale in the same stock with the same person between two settling days may exactly balance each other. When the settling day arrives each member only transfers or delivers and accepts and pays for the then balance of each particular description of stocks or shares contracted for with each person with whom he has dealt. In the case of securities requiring transfer, a ticket containing the name of the transferee and the consideration money is issued by the member who takes up such securities; and, such ticket being passed through many hands to some member having to transfer, the final balance alone of the stock or shares, the subject of many transactions, is only once transferred or delivered to the final purchaser or purchasers. Until the ticket day (the day before the settling day) arrives, and the names of the transferees who are the last purchasers as respects the various series of transactions (though not necessarily the last in point of time) are past, no member is aware to or from whom transfers will be ultimately effected. It constantly happens that, as the result of one sale, a large number of transfers may have to be made to a number of persons who were not parties to such sale, the bargains of many intermediate purchasers and sellers being either made up or closed by the passing of tickets; or a large number of bargains may have been entered into under a single instruction to buy or sell a certain amount of stock or shares, and in the course of the adjustment through the books of different members of the *Stock Exchange*, those various bargains may result in a few transfers or deliveries, or in one transfer or delivery only.

"The tickets containing the names of the transferees are passed on the ticket day, which is the day before the settling day, from buyer to seller, and thus all transactions of middle-men, viz., those who on balance of account have neither to take up nor to deliver stocks or shares, are closed, just as bankers' cheques are cleared at the Bankers' Clearing House, and the original seller or transferor and the ultimate buyer or transferee are thus brought together.

"Bargains in stocks and shares deliverable to bearer may likewise either be "made up" (that is to say, balanced in the member's books without delivery) or simply delivered or closed by means of tickets; and on the settling day all the stocks and shares of this class remaining open on balance of account are received by the buyers from different sellers. These, when received, are counted out and indiscriminately delivered, just as a banker's clerk counts out so many ten-pound notes and so many five-pound notes in cashing a cheque without selecting any particular notes as received from any particular source for the purpose of paying any particular cheque presented.

"When a member is unable to meet his engagements, he gives notice to that effect to the secretary of the committee; and, the previous authority of the chairman, or of the deputy chairman, or of any two members of the committee having been obtained, he is thereupon declared a defaulter, and an officer of the *Stock Exchange*, called the official assignee, at once ascertains and declares the actual market prices, ruling immediately before the default, of the several securities in which the defaulter has transactions open.

"By the rules and practice of the *Stock Exchange* members having bargains open in stocks and shares which the defaulter has contracted either to take or deliver, but which contracts he breaks by his default, pay to the official assignee of the *Stock Exchange* the difference in value of the stock or shares in which they have dealt with the defaulter as determined by the prices fixed by the official assignee at the time of default, when the change in price of any of such stocks or shares is against such members; and, on the other hand, become entitled to claim against the fund so created in the hands of the official assignee for any such differences when in their favour.

"The defaulter does not by reason of his default acquire under the rules of the *Stock Exchange* any right or claim to differences or damages against the members with whom he has dealt in respect of the contracts broken by him by his default, nor to the moneys payable as differences to the official assignee of the *Stock Exchange* under the rules of the *Stock Exchange*. The object of these rules is to adjust the accounts of the members as between

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themselves, dropping the defaulter by reason of his default out of each series of bargains in which he may have been one of the successive contracting parties.

"If, as frequently occurs, the principal of a defaulting broker goes, on or before the account day, to a member who has had a transaction open with the defaulter at the time of his default, and asks to complete the bargain, the member is bound to complete it; but still, by the rules, he is bound to account for and pay to the official assignee any amount received by him in excess of the price fixed by the official assignee at the time of the default for the stock the subject of the bargain.

"Had Mr. *Plumbly* not become a defaulter, and not become a liquidating debtor, and had all the contracts matured and been duly performed by him, none of the differences created and received by the official assignee of the *Stock Exchange* in consequence of his default could have found their way into Mr. *Plumbly's* hands or possession. If the contracts had matured and been performed in the usual way by the payment or receipt of differences, these differences would not have been the same in amount as the differences which became payable to or claimable against the official assignee in respect of the contracts by reason of the default as hereinbefore stated. In payment of differences bank-notes or cash do not pass, and cannot be demanded. All payments on account of differences must be by crossed cheques on a Clearing House banker, and the whole of the differences to which any member of the *Stock Exchange* becomes entitled, and which he is liable to pay on each account day, must all pass through the Clearing House together, and he never receives, and, by the rules of the *Stock Exchange*, never can receive more than the balance, if in his favour, between the differences he has to receive and to pay as one of the various series of dealers with whom he has had transactions, and then only if this ultimate balance of all his transactions prove to be in his favour, that is, if he has made a profit on the account; otherwise the general balance of all his dealings goes to his debit through the operation of the banker's clearing. The credit differences of each member of the *Stock Exchange* are thus, and are intended to be, directly hypothecated for the payment of his debit differences. This practice, established

by the rules and by invariable custom, secures all the differences payable by each member on the moneys receivable by him, and protects the vast amounts of the crossed cheques drawn on bankers on every account day by cheques of nearly similar amounts payable and receivable by the same members on the same day.

"It may happen, and does occasionally happen, in cases of default on the *Stock Exchange*, that the amount of credit differences payable to the official assignee is more than sufficient to pay the total amount of the debit differences claimable from the official assignee, as, for instance, if a member fails to receive in due course remittances from principals or correspondents, or if members with whom he may have dealt, and from whom he may have to receive moneys, themselves make default. In any such case, where the amount of the credit differences exceeds the amount of the debit differences, the balance is applicable for or towards discharge of any claims other than for differences.

"Except in such cases as those last mentioned, the balance of a defaulter's dealings on the particular account is invariably against him, inasmuch as it is owing to the fact that he finds that, as the result of all his transactions for the particular account day, the balance will be against him, that he announces his default, and there can be no moneys which could ever be receivable by the defaulter himself, or any one on his behalf, in respect of his open contracts, even had such default not occurred."

An affidavit made by the official assignee contained the following statements:—

"Differences payable to the official assignee are payable on the day for which the contracts are entered into, in this case the 27th June, the settling day.

"In accordance with the rules of the *Stock Exchange* applicable to cases of the kind, those members in whose favour the differences might result would send in their claims for the amount of such differences, and would be entitled to participate rateably, and in priority to any other claims, in the distribution of the moneys paid to me in respect of the differences which became payable to me.

"All differences that become payable in consequence of a

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default, arise and exist only through the operation of the rules and usage of the *Stock Exchange*. Such differences are by the rules payable only to the official assignee, and cannot be paid to or received by the defaulter. No payment to the defaulter or any other person after the declaration of default would discharge the liability of any member to make payment to the official assignee, under pain of his becoming himself a defaulter. No defaulter can, after the declaration of his default, deal on or enter the *Stock Exchange* for the purpose of dealing therein, or for any other purpose.

"It rarely happens that a member of the *Stock Exchange* who becomes a defaulter is made a bankrupt or petitions the Bankruptcy Court. I have caused search to be made in the records of the *Stock Exchange* and in *Perry's* List of Bankruptcies and Liquidations for the years from 1875 to 1878 inclusive, and I am informed and believe that the result of such search is as follows: In the year 1874 there were twenty-six defaults on the *Stock Exchange*, five of which were followed by bankruptcies or liquidations. In the year 1875 there were thirty-three defaults, and only two of the defaulters went into liquidation, and there was no bankruptcy. In the year 1876 there were fifty-three defaults, and one only of the defaulters became bankrupt, and there was no liquidation. In 1877 there were thirty-four defaults, and only one liquidation and no bankruptcy; and in 1878 there were thirty-five defaults, and only one bankruptcy and no liquidation.

"A contract by a member may, and frequently does, in case of that member becoming a defaulter, result in a difference becoming payable to the official assignee, which would otherwise result on the day on which the contract had to be completed in a difference becoming due from that member, and the converse case may and frequently does occur."

The Registrar held that the case was governed by the decision of the House of Lords in *Tomkins* v. *Saffery* (1), and that the fund in Court was part of the estate of the debtor, and he ordered that it should be paid to the trustee. The official assignee of the *Stock Exchange* appealed.

(1) 3 App. Cas. 213.

Herschell, Q.C., and *Romer*, for the Appellant:—

(1.) There is no privity between the trustee and the official assignee which can entitle him to say that the assignee received this money to his use. The trustee is claiming adversely to the assignee. Therefore, even if the money ought to have been paid to the trustee, and has been wrongly paid to the assignee, the trustee cannot recover it from the assignee. If he has any remedy it is against the persons who have wrongly paid the assignee, and who have, on that supposition, not got a good discharge for what they have paid: *Rogers* v. *Kelly* (1).

[JAMES, L.J., referred to *Smith* v. *Union Bank of London* (2).]

(2.) The money in question is a fund which came into existence only by virtue of the rules of the *Stock Exchange* on the default of the debtor. These differences would never have been payable to the debtor himself, and they form no part of his estate. If he had remained solvent his contracts would have been closed, not at the prices at the time of the default, but at the prices on the settling day, which was two days afterwards. The prices might have been quite different on that day. The trustee is in fact claiming the benefit of the rules of the *Stock Exchange* so far as they create the fund, while he asserts that he is not bound by them so far as they regulate its distribution. He cannot thus approbate and reprobate. All contracts on the *Stock Exchange* are made subject to its rules, and even outsiders are in some respects bound by those rules, though the rules as to the payment of differences do not affect the right of a principal who has dealt through a broker to have his contract completed. The rules are not intended to interfere with that right. The trustee in bankruptcy could not have insisted on the completion of any profitable contracts of the debtor, for the debtor had, before the time for fulfilling them had arrived, declared that he was not ready and willing to complete them, and of course the trustee is entitled, under sect. 23 of the *Bankruptcy Act*, 1869, to disclaim any unprofitable contracts.

Crump (*Benjamin*, Q.C., with him), for the trustee:—

The contracts in respect of which these differences were paid,

(1) 2 Camp. 123. (2) 1 Q. B. D. 31.

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were ordinary contracts for the purchase of stock and shares. At law an action could have been maintained for damages for the breach of them. By virtue of the rules of the *Stock Exchange* the damages are a liquidated sum.

[JAMES, L.J.:—It is not a liquidated sum as between you and the persons who have paid it.]

It is admitted that the principal on any of these contracts might have come in and completed it, and, if so, the difference to be paid would have been determined on the settling day. Outside creditors are entitled to have their contracts carried out just like any other contracts. In *Thacker* v. *Hardy* (1) it was held that a broker was entitled to recover from his principal differences which he had become liable to pay in respect of contracts on the *Stock Exchange* entered into on his behalf. If *Plumbly* had had no *Stock Exchange* creditors, the whole of the differences on his contracts, if they had been winning contracts, would have gone into his pocket.

[JAMES, L.J.:—There is no such thing as a legal right to receive differences. If *Plumbly* had remained solvent he could have compelled the fulfilment of the contracts which had been entered into with him. Differences are payable only by virtue of the *Stock Exchange* rules.]

How could the official assignee be entitled to moneys coming to *Plumbly?* Suppose he had had none but winning contracts on the *Stock Exchange*, and he had been made a bankrupt by outside creditors. That of itself would have made him a defaulter on the *Stock Exchange*. In such a case would not the differences payable by the *Stock Exchange* rules have gone to *Plumbly's* trustee in bankruptcy? The case is really governed by *Tomkins* v. *Saffery* (2). The trustee in bankruptcy claims by a higher title. But for the intervention of the official assignee, the trustee might have carried out *Plumbly's* contracts. Why are not his outside creditors entitled to the benefit of them? It is contrary to the policy of the bankrupt law that the *Stock Exchange* creditors should stand in a better position than the outside creditors.

(1) 4 Q. B. D. 685. (2) 3 App. Cas. 213.

JAMES, L.J.:—

We do not desire to hear you further, Mr. *Herschell,* nor is it necessary to the determination of the question before us that we should say to what extent these contracts on the *Stock Exchange* affect other contracts. I cannot conceive that the contracts of the outside world can be affected by what has been done in this case under the rules of the *Stock Exchange.* If any outside persons had any rights, they still have them in their entirety, whatever they may be. I think that in this case, beyond all question, the money which was claimed by the official assignee of the *Stock Exchange* was not money which he was liable to pay to the trustee in the bankruptcy. He claimed it hostilely to the trustee, and how, then, can the trustee receive it from him as money paid to his use? In my view, the case which was suggested in the argument is exactly the present case. *B.* and *C.* each say to *A.*, you owe me that £100. *A.* pays it to one of the two, the other has no right to sue the one who received it. The official assignee claims these differences in his own right, and of course the payment which was made to him would not discharge the debtor if the debtor had paid it to the wrong man; he would still remain liable to pay it to the other. Whatever the liabilities and the rights of the outside world may be, they remain unaffected. Either the rules of the *Stock Exchange* are binding on outsiders, or they are not. If they are binding, they are binding in their entirety. If they are not binding, or are in any way a violation of the law of bankruptcy—what we call a fraud on the law of bankruptcy—they are utterly void and of no effect against the outside world. Any one of the outside world—*e.g.*, the trustee in the bankruptcy—retains all his rights against any debtor to the bankrupt, although he be a member of the *Stock Exchange,* just in the same way as he would if those rules which provide for payment to the *Stock Exchange* assignee had never existed. It appears to me that Mr. *Herschell's* contention is not a technical one, but that it involves the whole of the merits of the case.

BAGGALLAY, L.J.:—

I am of the same opinion. The distinction to be drawn between

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this case and that of *Tomkins* v. *Saffery* (1) is a very marked one. In the latter case a Mr. *Cooke* became a defaulter, and the official assignee of the *Stock Exchange*, being informed that he had no creditors except *Stock Exchange* creditors, pressed him to make over all his property for the benefit of his only creditors, and among other things *Cooke* drew a cheque for £5000 against his account at the *Bank of England*, and gave it to the assignee. It turned out that *Cooke* had other creditors, and it was held that the interposition of the official assignee of the *Stock Exchange* could not justify the separation of the £5000 from *Cooke's* general assets. Here there is no diversion of *Plumbly's* money from his creditors. The official assignee holds no private assets of *Plumbly;* the fund which he has collected is a fund collected by virtue of certain rules of the *Stock Exchange*, certain sums ascertained in a particular way being raised from particular members of the *Stock Exchange* to be applied in a particular manner. In the view which I take of the case, these funds can in no respect be regarded as funds belonging to *Plumbly*. If then they are voluntary contributions of the members of the *Stock Exchange* to be applied in satisfaction of the *Stock Exchange* creditors, or if they are to be regarded as moneys handed over by persons who had become sureties to meet the claims of the *Stock Exchange* creditors, I am unable to understand how in either view of the case they can be claimed by the trustee. It did at one time occur to me that some injustice might be done to the general creditors of *Plumbly* by the official assignee taking these sums; but, on further consideration, the true view of the case appears to me to be this—so far as regards any losing contracts entered into by *Plumbly*, the trustee is relieved from them, and if, on the other hand, there are any winning contracts, the answer as regards them is that it would be impossible for him to recover on them, because, when the time arrived for the completion of those contracts, *Plumbly* could not and would not have been ready and willing himself to perform them. In making these observations I do not mean to imply that in such cases the contracts, whether losing or winning, are absolutely void; but, in regard to the case now under our consideration, I am

(1) 3 App. Cas. 213.

satisfied that no injury could be done to the outside creditors by the course pursued.

COTTON, L.J.:—

Many matters have been discussed upon which it would not be right to give an opinion, because all that we have to consider is whether the trustee in the bankruptcy can obtain from the official assignee of the *Stock Exchange*, as he is called, the fund in question, and it seems to me that that question is shortly disposed of in this way. The fund is an artificial one, which never belonged to the bankrupt, but has been created by the rules of the *Stock Exchange* for a particular purpose, and only has an existence for the purpose of being dealt with in a particular way. What is to be done with any surplus after that purpose has been satisfied, is another question. But the trustee wants to take from the official assignee of the *Stock Exchange* a fund created for a particular purpose without applying it to that particular purpose. In my opinion he is not entitled to do that.

JAMES, L.J.:—

The appeal will be allowed with costs, unless there has been any arrangement between the parties as to the costs.

Crump asked for leave to appeal to the House of Lords.

THEIR LORDSHIPS gave leave.

Solicitors for Official Assignee: *Travers Smith & Braithwaite.*
Solicitors for Trustee: *Crump & Son.*

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May 1, 2, 7.
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1880
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KELLY *v.* BYLES.

[1878 K. 116.]

Copyright—Right to use Title of Book—Exclusive use of Name "Post Office" Directory—Trade-Mark—Copyright Act, 1842 (5 & 6 *Vict. c.* 45)—*Shorthand Notes of Evidence—Costs.*

The Plaintiff was the registered proprietor of the copyright of a directory entitled the "*Post Office Directory of the West Riding of Yorkshire*," and he had for several years published "*Post Office Directories*" of other counties. The Defendants published a directory for the town of *Bradford*, which is within the *West Riding*, intituled "*The Post Office Bradford Directory*," but it was not similar to the Plaintiff's directory in price or appearance. There was no evidence to satisfy the Court that the words "Post Office" in connection with directories had become necessarily connected in the minds of the public with the name of *Kelly*:—

Held, that the Plaintiff had no right to the exclusive use of the words "Post Office Directory," and his claim for an injunction was refused.

The judgment of *Bacon*, V.C., affirmed.

As a general rule the Court of Appeal refuses the costs of shorthand notes of the evidence in the Court below.

THIS was an action by Mr. *Edward Robert Kelly*, the publisher and registered proprietor, under the *Copyright Act*, 1842 (5 & 6 Vict. c. 45), of a book entitled "*Post Office Directory of West Riding of Yorkshire*," which included the town of *Bradford*, to restrain the intended publication by the Defendants, Messrs. *W. Byles & Son*, of *Bradford*, of a Directory of *Bradford*, as advertised by them, with the words "Post Office" forming part of the title, and from in any way representing their directory as a "Post Office" Directory, or from doing anything which would induce the belief that the directory advertised by the Defendants was a directory compiled or published by the Plaintiff, or by his authority, or in any way connected with him or his business.

The origin of the term "Post Office" as applied to directories was as follows: In the year 1800 Mr. *Critchett*, an inspector of letter-carriers in the *London Post Office*, published, with the assistance of the letter-carriers, a directory which he called "*The Post Office Directory*." In 1837 Mr. *Frederick Festus Kelly*, a brother of the Plaintiff's, became the publisher and proprietor of this

work, which was carried on by him until 1846 with the assistance of the letter-carriers as before. In the year 1846 the Plaintiff's brother was prohibited by the Post Office authorities from employing the letter-carriers any longer, and he thereupon employed a large staff of private agents and travellers to obtain the information necessary for the continuance of his directory, which was still called the *Post Office Directory*, and which he continued to publish annually down to the present time, it being the well-known work called "*Kelly's Post Office Directory.*" In the year 1852 the Plaintiff commenced publishing country directories, making use of his brother's staff of agents and travellers, and with his brother's consent called his directories "Post Office" Directories. Among these numerous directories was one called the "*Post Office Directory of the West Riding of Yorkshire,*" which comprehended the whole of the *West Riding of Yorkshire.* This directory had been duly registered by the Plaintiff under the *Copyright Act*, 1842, on the 6th of April, 1878. The Plaintiff alleged that his directories were distinguished and known in the trade and to the public as "Post Office Directories," and that the term "Post Office" was a very valuable trade designation, distinguishing his directories from others. In the month of October, 1878, an advertisement sheet and prospectus of a directory intituled "*The Post Office Bradford Directory*" were forwarded to the Plaintiff, from which it appeared that the Defendants had in preparation, and would publish early in 1879, a new directory of *Bradford*, intituled "*The Post Office Bradford Directory.*" On the 29th of October, 1878, the Plaintiff's solicitor wrote to the Defendants, informing them of the Plaintiff's claim and title to the exclusive use of the words "Post Office" as part of the title of the directories published by him; but as the Defendants, by their solicitor, refused to acknowledge the right of the Plaintiff to the exclusive use of the words "Post Office," the present action was commenced on the 8th of November, 1878. It appeared that the Defendants had received the assistance of the postmaster at *Bradford*, and had with his sanction employed the letter-carriers to obtain for them the materials necessary for the greater portion of their work; but, the matter having been brought to the attention of the Postmaster-General, the further employment of the letter-

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carriers by the Defendants was forbidden, though the materials already collected were allowed to be used, subject to the condition that the work should not be represented as having the sanction or assistance of the Post Office.

It also appeared from the evidence during the trial that in *Ireland* and in several towns in *Scotland* Post Office Directories had long been published; that for twenty-one years past there had been and still was at *Bath* a Post Office Directory published with the Plaintiff's knowledge, and that there was a similar publication at *Bolton* under the same title.

It was not alleged that there had been any copying or colourable imitation of any part of the text of the Plaintiff's work; neither was there any similarity in price or appearance between the two directories; the only question was the right of the Plaintiff to the exclusive use of the word "Post Office" as applied to directories.

The action came on for trial before Vice-Chancellor *Bacon* on the 1st of May, 1879.

Kay, Q.C., *Hemming*, Q.C., and *Leeson*, for the Plaintiff:—

The Plaintiff having registered his work under the *Copyright Act* (5 & 6 Vict. c. 45), is entitled to prevent the user or appropriation of any of the words protected by registration. In the case of a book, which is different in this respect from a newspaper, there is copyright in the title, and an injunction will be granted where the title or any material portion of it is attempted to be taken or copied: *Mack* v. *Petter* (1); *Metzler* v. *Wood* (2); *Weldon* v. *Dicks* (3). It seems clear that there is nothing analogous to copyright in a newspaper: *Kelly* v. *Hutton* (4); but the proprietor has a right to prevent any other person from adopting the same name for any other similar publication: *Bradbury* v. *Beeton* (5). In *Maxwell* v. *Hogg* (6) the injunction was refused because the Plaintiff's book, "*Belgravia*," had not then been published. Again, independently of any question of copyright, we submit that the Plaintiff is now entitled to the exclusive use of the name

(1) Law Rep. 14 Eq. 431.
(2) 8 Ch. D. 606.
(3) 10 Ch. D. 247.
(4) Law Rep. 3 Ch. 703.
(5) 39 L. J. (Ch.) 57.
(6) Law Rep. 2 Ch. 307.

he has adopted, "Post Office," as the *quasi* trade-mark of the commodity he offers for sale; for if a person has acquired a property in a name—either the name of a book or a conspicuous word in a trade-mark—the important words in that name cannot be used by any other person in such a way as to induce the public to believe that the spurious article offered for sale is the article of the Plaintiff: *Braham* v. *Bustard* (1); *Wotherspoon* v. *Currie* (2); *Singer Manufacturing Company* v. *Wilson* (3). And in the case of a book it does not matter whether the name has been registered or not. Neither does the fact that the name has been innocently appropriated make any difference: *Weldon* v. *Dicks* (4).

Sir *H. Jackson*, Q.C., and *Rigby*, for the Defendants:—

First as to the question of copyright. Copyright is a creature of statute, defined by statute, and to be enforced only according to the terms of the statute. The title of a book is not the subject of copyright. It was not necessary for the Legislature to provide for the title in the *Copyright Act* (5 & 6 Vict. c. 45), because there already existed a remedy in equity for the infringement of a name. And although the term "copyright" has been inadvertently applied to the right in the title of a publication by Lord *Romilly* in *Mack* v. *Petter* (5), the title is not part of the copyright: *Correspondent Newspaper Company* v. *Saunders* (6); *Maxwell* v. *Hogg* (7); *Kelly* v. *Hutton* (8); *Sebastian* on Trade Marks (9); and registration under the *Copyright Act* gives no further right to protection than exists independently of such registration. In *Mack* v. *Petter* and *Metzler* v. *Wood* (10) there was a colourable imitation on the part of the Defendants, which is not the case here, and in *Weldon* v. *Dicks* the whole title had been taken. What the Plaintiff has registered is "*Post Office Directory for West Riding of Yorkshire*," and the Defendants' proposed title is no equivalent for the Plaintiff's registered title, so that even if the Plaintiff had a copyright, we have not infringed it.

(1) 1 H. & M. 447.
(2) Law Rep. 5 H. L. 508.
(3) 2 Ch. D. 434; 3 App. Cas. 376.
(4) 10 Ch. D. 247.
(5) Law Rep. 14 Eq. 431.
(6) 11 Jur. (N.S.) 540.
(7) Law Rep. 2 Ch. 307.
(8) Ibid. 3 Ch. 708.
(9) Page 171.
(10) 8 Ch. D. 606.

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Then, in order to establish a property in a trade-mark or name, the Plaintiff must prove, first, that he was the inventor of the mark or name, and that he was the first to use it for the purpose in question; second, that it was a "fancy" or arbitrary name, and not a name fairly descriptive of a well-known commodity, as in the paraffin oil case, *Young* v. *Macrae* (1); third, exclusive user; and fourth, that the Defendant has colourably imitated or pirated the name or mark. On the first point the evidence clearly shews that the Plaintiff was not the first to use this term "Post Office." On the second point the evidence also shews that "Post Office" is a well-known term as applied to directories of this kind, and on the third point, that there has not been exclusive user of this name by the Plaintiff alone, for there were the *London Post Office Directory*, the *Bath* and the *Bolton Post Office Directories* all in circulation; and on the fourth point the Plaintiff does not attempt to make out that our directory is a colourable imitation of his, or that there has been any piracy of the subject-matter of the text. This action cannot therefore be sustained.

Kay, in reply:—

In the *Copyright Act* (5 & 6 Vict. c. 45), s. 2, "book" is to include any "volume, part or division of a volume, sheet of letter-press," &c., and the title-page of a book is entitled to protection, but the Plaintiff does not rely on the *Copyright Act*. In *Metzler* v. *Wood* (2) there was no copyright, but a proprietary right in the name "*Hemy*." There are no authorities to shew that a Plaintiff cannot obtain an injunction unless he has invented the name in question; in the "*Eureka Shirt*" (3), "*Excelsior Soap*" (4), "*Anatolia Liquorice*" (5) cases, the words forming the trade-mark were not invented by the person first using them, but they had been used so long on the particular articles that they had become something in which the user had acquired a proprietary right, and that is just the Plaintiff's case with the words "Post Office." The words "Post Office" is a fancy name specially

(1) 9 Jur. (N.S.) 322.
(2) 8 Ch. D. 606.
(3) *Ford* v. *Foster*, Law Rep. 7 Ch. 611.
(4) *Braham* v. *Bustard*, 1 H. & M. 447.
(5) *M'Andrew* v. *Bassett*, 10 L. T. (N.S.) 442.

adopted by the Plaintiff irrespective of its original meaning, and the Defendants need not have employed this peculiar collocation of the words to express the fact that their directory had been compiled with the help of the Post Office authorities. No authority has been cited in support of the contention that exclusive user by the Plaintiff is necessary; the mere fact that there has been a Post Office Directory at *Bath* which has not been interfered with does not deprive the Plaintiff of his right against this Defendant or any one else who chooses to use his trade-mark.

May 7. BACON, V.C.:—

The novelty of the question which has been raised in this case, and the length of the arguments, together with the numerous authorities which have been referred to, induced me to postpone my decision for a short time, that I might give full consideration to the subject. [His Lordship, after stating the facts and the history of the name "Post Office" Directories, as above, continued:—]

I have mentioned these particulars not only because they have been introduced in evidence, and have been the subject of observation in the course of the discussion, but because they have a direct bearing upon the question of good faith on the part of the Defendants, which in a case like the present cannot be disregarded. It cannot, I think, be said that there has been any want of good faith, or any sinister or underhand practice on the Defendants' part. It cannot be said that a printer and publisher of *Bradford*, or any other town, is not at liberty to supply what he considers to be a town want by the publication of a directory. The only question I have to decide is whether, by doing that which he has announced an intention to do, he will unlawfully injure the Plaintiff's property, that property being the title and appellation of the Plaintiff's work.

The Plaintiff's case has been argued on two grounds. First it is said that, having registered the title of his work under the *Copyright Act*, he is entitled to prevent all the rest of the world from using or appropriating any of the words protected by the registration; and secondly, that he is entitled to the exclusive use of the name he has adopted, as having become the trade-mark of the commodity he offers for sale.

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The spirit and the policy of the Copyright Acts are clear and beyond all doubt. It is for the public benefit that the authors of all literary works should have the exclusive enjoyment and profit of their labours for the periods there mentioned. It comprehends all productions which assume a literary form from works of the highest genius in poetry, science or art, down to the humblest productions of intellectual industry; all are placed upon the same footing, and in the eye of the law are entitled to equal protection provided they are original in the sense of being first made public by their respective authors. Mr. *Tennyson's Idylls,* and the last edition of *Paterson's Road Book,* or the *Great Western Time Table,* must not be copied or colourably imitated, in the whole or in part, without the consent of the proprietors. But in trying the question whether the legal right of the proprietor has been infringed or not, the Courts have at all times inquired whether the act complained of has been committed *animus furandi,* to use Lord *Ellenborough's* expression: *Cary* v. *Kearsley* (1). In the numerous cases which have occurred, as well under the former Copyright Acts as under the present, this principle has been applied as a test and has guided the decisions pronounced, and indeed it must be so or it would be impossible to review or criticise any printed work. Several cases were referred to in support of the Plaintiff's contention that his title under the *Copyright Act* had been infringed. Among others *Mack* v. *Petter* (2) was mentioned. The Plaintiff in that case was the proprietor of copyright in the "*Birthday Scripture Text Book.*" The Defendant had published a "*Children's Birthday Text Book.*" That the latter was merely a colourable imitation of the former could not be disputed. Lord *Romilly* in deciding that case no doubt mentions the Plaintiff's right as owner of the copyright; but it is impossible to read his judgment and to doubt that the injunction he granted was to restrain the Defendant's "colourable imitation" of the actual book which the Plaintiff had first sent into the world. In *Metzler* v. *Wood* (3) the same principle governed the decision. There was no registration, and the judgment of the Lord Justice *James* (in which the other

(1) 4 Esp. 168. (2) Law Rep. 14 Eq. 431.
(3) 8 Ch. D. 606.

Judges concurred) states expressly the conclusion of the Court that it had been proved that the Defendant did dishonestly intend to pass off his as the work of the Plaintiff, and that the fraud imputed to the Defendant had been made out.

In *Weldon* v. *Dicks* (1) the Plaintiff was the undoubted owner of a copyright in a tale called "*Trials and Triumphs.*" The Defendants had also published a tale under the identical title. The Vice-Chancellor was of opinion that the Plaintiff's title under the statute must prevail, although he was satisfied that the Defendant had acted in perfect innocence, and in utter ignorance that the Plaintiff, or any other person, had ever published anything under the title which the Defendant or his author had unconciously adopted, and although there was no similarity whatever between the contents of the two works.

There, however, the Defendant had literally used every word of the title of the Plaintiff's copyright tale. In this case it cannot be said that the Defendants' "*Post Office Bradford Directory*" is a copying of the Plaintiff's "*Post Office Directory of the West Riding of Yorkshire*"—a distinction and difference which makes it wholly unnecessary for me further to observe on *Weldon* v. *Dicks;* nor do I think that the case of *Maxwell* v. *Hogg* (2), respecting the title of a magazine called or to be called "*Belgravia,*" which was a dispute between two tradesmen each of whom tried to circumvent the other, and in which both their bills were dismissed, has any application to the case I am called upon to consider.

No case has been referred to in which it has been suggested that the taking a part of the title of a registered copyright work, without fraud, without anything from which the *animus furandi* can be inferred, is an infringement of the present or any of the preceding Copyright Acts.

But there remains to be considered the other ground upon which the Plaintiff's claim to relief is founded. It is said that the Plaintiff having assumed the title of his directory, it has become as much his property as if it were a trade-mark, that it is the device or symbol by which he vends his wares, and that no other person can adopt or use it without doing that which is calculated to deceive the public, and to induce persons who desire to become

(1) 10 Ch. D. 247. (2) Law Rep. 2 Ch. 307.

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the purchasers of the Plaintiff's book to be put off by having in its stead the Defendants' sold to them. Reference was made to the well-known cases of the "*Glenfield Starch*" (*Wotherspoon* v. *Currie* (1)), "*Excelsior Soap*" (*Braham* v. *Bustard* (2)), the "*Anatolia Liquorice*" (*M'Andrew* v. *Bassett* (3)), and others in which the law which had been established and recognised for several centuries, was applied. It cannot be doubted that a manufacturer or dealer, who has stamped or otherwise marked upon his wares any device for the purpose of distinguishing them from all others of the same or the like kind, may restrain other manufacturers or dealers from using the same or a like device upon wares of a similar description, and may recover damages for such use. But that applies only to wares which are identical or so nearly identical as that the one commodity may be easily mistaken for the other, or even where the resemblance between them is such as is calculated to mislead or impose upon unwary purchasers. And it was upon this principle alone that the cases referred to were decided. It cannot be denied that the Defendants were and are entitled to publish a directory for *Bradford*. Their right in this respect cannot be affected by the fact that in the Plaintiff's large and comprehensive volume *Bradford* is included, nor by the fact that out of the Plaintiff's 1704 pages 126 pages are devoted to *Bradford*. It is not the fact that in shape, size, or appearance, or in any material respect, except so far as the names and addresses are concerned, there is any resemblance. The names and addresses have been procured by the actual individual exertions and at the cost of the Defendants, and without recourse to, or copying or imitating the Plaintiff's work. The Plaintiff's work is addressed to the large community inhabiting or interested in the *West Riding*. The Defendants' is compiled for the use only of the inhabitants or persons connected with the town of *Bradford*. The price of the Plaintiff's book is 36*s*., and that of the Defendants is 7*s*. 6*d*. The only feature of what can be called resemblance is that the words "Post Office" are to be found in the title of each. To hold under these circumstances that any person desiring to possess the Plaintiff's *West Riding Directory* might be misled or deceived into

(1) Law Rep. 5 H. L. 508. (2) 1 H. & M. 447.
(3) 10 L. T. (N.S.) 442.

buying the Defendants' *Bradford Directory*, seems to me to be wholly unwarranted by the facts in evidence and so grossly improbable as to be impossible to be inferred. C. A. 1880 KELLY v. BYLES. V.-C. B.

I think it is quite unnecessary to inquire by what right the Plaintiff calls his book the *Post Office Directory*. If it were requisite to do so I should perhaps be under the necessity of considering the evidence which has been given, that in *Ireland* and in several towns in *Scotland* Post Office Directories have been published for many years; that for twenty-one years past there has been and there is still at *Bath* a Post Office Directory published with the Plaintiff's knowledge, and that there is a publication in *Bolton* under the same title. But, assuming that the Plaintiff was and is, until his right to do so shall be effectually disputed, entitled to use the title which he has chosen for his own work, I am of opinion that the Defendants have a perfect right to call their intended publication the "*Post Office Bradford Directory*," and that the Plaintiff having failed to establish any right to restrain that publication, the judgment in this action must be for the Defendants.

From this decision the Plaintiff appealed. The appeal was heard on the 10th of February, 1880. C. A.

Kay, Q.C., *Hemming*, Q.C., and *Leeson*, for the Appellant:—

We prefer to rest our case upon the Plaintiff's right to the name as a trade-name: *Hall* v. *Barrows* (1). He had acquired the exclusive right to it, not on account of any connection with the Post Office, but as a fancy name describing the book. To many purchasers "Post Office" means "*Kelly's*," and we need not prove that it is so understood by all. The Defendants' use of it is calculated to deceive the mercantile portion of the public, who know the Plaintiff's directories under the name of Post Office Directories. If it is calculated to deceive, it makes no difference that the Defendants did not intend to deceive. The right of the Plaintiff to the sole use of the name is an absolute right: no one has a right to appropriate the catch-word of another's trade designation even though the goods he sells may have a different appearance from the Plaintiff's.

(1) 33 L. J. (Ch.) 204. 4 De G. J. & S. 150

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Sir *H. Jackson*, Q.C., and *Rigby*, for the Defendants, were not called on.

JAMES, L.J.:—

I am of opinion that the judgment of the Vice-Chancellor must be affirmed. The case of the Plaintiff is that the words "Post Office," used in connection with directories, are synonymous with "*Kelly*," and that merchants, tradesmen, and commercial travellers, in buying "Post Office Directories," would think that they were buying *Kelly's* directories. The words "Post Office" are certainly not a synonym for the Plaintiff in *London*, as there is in *London* a Post Office Directory published by another *Kelly*. The words "Post Office" in connection with a directory certainly did not denote the Plaintiff's in *Edinburgh*, or in *Ireland*, or at *Bath* or *Bolton*. In all those places there are Post Office Directories published by persons other than the Plaintiff. In my opinion there is not a particle of evidence to shew that any tradesman, merchant, or commercial traveller, who has bought a Post Office Directory in *England*, thought that the words "Post Office" connected with directories meant "*Kelly*." The Plaintiff's argument must go to this extent, that if they mean *Kelly* in *England*, they mean the same in *Scotland* and *Ireland*, but the Plaintiff has not attempted to establish any such proposition as to those two countries. In my opinion the claim of the Plaintiff is not analogous to copyright, but is an extravagant extension of the right to a trade-mark. The words "Post Office" in connection with a directory are descriptive of the work, and imply that it was compiled with the assistance of the letter-carriers and other servants of the Post Office, and for this reason is calculated to give the most accurate information. Now the Plaintiff does not obtain the assistance of the servants of the Post Office, and the title of his directories represents what is not strictly true. But in the case of the Defendants the use of the words is strictly correct. He did get the assistance of the servants of the Post Office at *Bradford*. He had a right to get that assistance if he could, and he had a right to say that he had got it. It does not appear that anybody has been deceived, and there was no evidence that what has been done was calculated to deceive the public. The Defen-

dants have done nothing but what was righteous, honest, and just; and the appeal must be dismissed with costs.

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BAGGALLAY and COTTON, L.JJ., concurred.

Sir *H. Jackson* asked for the costs of the shorthand notes of the evidence in the Court below.

JAMES, L.J.:—

We see no reason for departing from the ordinary rule, namely, to refuse such costs. It should be understood by the profession that we strongly discourage shorthand notes of evidence. The Judge's notes of the evidence ought, as a general rule, to be sufficient for the purposes of the appeal.

Solicitors: *William Kelly; Seal*, agent for *Rawson, George, & Wade, Bradford.*

In re NORWICH PROVIDENT INSURANCE SOCIETY.

C. A. 1880 *Feb.* 11, 18.

HESKETH'S CASE.

Winding-up—Contribution—Past Members—Companies Act, 1862, s. 38, *sub-s.* 3.

Bath's Case (1) held to be inconsistent with the previous decision in *Bath's Case* (2), and reversed on that ground.

A question having arisen in settling the lists of contributories in an insurance company whether one or both of two classes of shareholders were liable on a certain class of policies:—

Held, that the question could not properly be discussed in the absence of the claimants under the policies, especially as it was possible to decide the case on an independent ground.

THIS was an appeal by *Thomas Hesketh* from an order of Vice-Chancellor *Bacon*, made in Chambers in the winding-up of the *Norwich Provident Insurance Society*, directing him to pay into Court £750, being the amount of a call made on the 8th of July, 1878, on 1000 B shares held by him in the company.

The circumstances of this case differed in no material particular

(1) 11 Ch. D. 386. (2) 8 Ch. D. 334.

C. A. 1880 HESKETH'S CASE.

from those of *Bath's Case* (1), and this was substantially an appeal from that decision. The facts will be found in that report and in *Bath's Case* (2).

Sir *H. Jackson*, Q.C., and *Romer*, for the Appellant :—

The case is, in fact, decided by *Bath's Case* (3).

Hemming, Q.C., and *Brett*, for the liquidator :—

The case is not only not decided, or intended to be decided, by *Bath's Case* when before this Court, but the point was not even raised at the hearing whether the release involved an indemnity or not. What was said by Lord Justice *Cotton* when the minutes were spoken to could not, for obvious reasons, have been meant as a decision on the point. Even if the question as to the liability to indemnify had been raised and established against the company, it would make no difference, because any such liability, like every other liability arising out of fire business, would, by the terms on which the fire shares were originally taken, fall exclusively on the holders of them in exoneration of the life shareholders.

JESSEL, M.R. :—

It would not be proper, I think, on this present occasion to give any opinion as to whether or not, according to the true construction of the fire policies, having regard to the events which have happened, the shareholders generally are liable as contributories to the claim of the creditors in respect of the fire policies. Those creditors are not before us, and it will be time enough to discuss and decide on their claims when they are. I take it that we can decide the present contest without deciding upon their rights, and ought to do so, more especially as I see from the report of the proceedings in the Court below that there are different classes of those creditors. There is one class which has recovered judgment against the company, and there is another class which does not appear to have recovered any judgment.

The real question we have to decide is whether past shareholders who hold what have been called fire shares, that is, shares in the

(1) 11 Ch. D. 386. (2) 8 Ch. D. 334.
(3) 8 Ch. D. 334, 343.

new capital raised to carry on the fire business, can be made liable where there still remain solvent existing shareholders, and I think they cannot. The substance of what was decided on the former occasion by the Court of Appeal was this, that the company had validly released those, whom I will now call the past fire shareholders, from all liability in respect of their shares, and therefore became liable as between the company on the one hand, and the past fire shareholders on the other, to indemnify the past fire shareholders from all claims in respect of their shares. That we decided to be a transaction *intrà vires*, and it was of course binding on the company and created a general liability as against the company, not limited to any particular funds or any particular contributions of its shareholders. That being so, as long as there is a single solvent existing shareholder, so long there is a person who is liable in the first instance to contribute to these claims if the claims of the creditors are valid, and it is therefore improper to make a call on the past shareholders because the existing shareholders are not exhausted.

Now, it is admitted before us that there are several such solvent shareholders. It seems to me, therefore, without going into the other details of the case, that no call should have been made on the past shareholders until these present solvent shareholders had been made to pay all they could pay in respect of the valid claims of the creditors, and consequently the appeal ought to be allowed.

JAMES and COTTON, L.JJ., concurred.

Solicitors: *Clarke, Woodcock, & Ryland; Tillyard.*

Considered. *Re* DIPLOCK. [1948] Ch. 465

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In re HALLETT'S ESTATE.
KNATCHBULL *v.* HALLETT.

[1878 H. 147.]

Banker—Lien—Following Trust Money—Entry by Banker—Order of Payment—Appropriation—Rule in Clayton's Case—Trustee.

If money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the bankers' hands.

Ex parte Dale & Co. (1) dissented from.

If a person who holds money as a trustee or in a fiduciary character pays it to his account at his bankers, and mixes it with his own money, and afterwards draws out sums by cheques in the ordinary manner:—

Held, by the Court of Appeal (*dissentiente Thesiger*, L.J.), that the rule in *Clayton's Case* (2), attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money.

Pennell v. *Deffell* (3) on this point not followed.

Held, by *Fry*, J., that, as between two *cestuis que trust* whose money the trustee has paid into his own account at his bankers, the rule in *Clayton's Case* applies, so that the first sum paid in will be held to have been first drawn out.

THIS case came on upon claims by several persons against money in the hands of the bankers of *Henry Hughes Hallett*, deceased. The action was brought by a general creditor for the administration of his estate.

As to a claim by the trustees of *Hallett's* settlement. By the marriage settlement of *Henry Hughes Hallett*, made in 1847, a sum of £2300 was settled for the benefit of *Hallett*, his wife and his children. Several changes were made in the investment of this fund, and the trustees had allowed the fund to come into the hands of *Hallett*. These changes were effected by *Hallett*, and were noted in a memorandum in his handwriting in the fold of the draft settlement, which terminated as follows: "The money remained in the *Great George Street* mortgage until September,

(1) 11 Ch. D. 772. (2) 1 Mer. 572.
(3) 4 D. M. & G. 372.

1865, when it was invested in Mr. *Walker's* estate. *Walker's* mortgage was paid off in November, 1870, and invested in £2590 Russian 5 per Cent. Stock." This was not strictly correct, as *Walker's* mortgage was really paid off in 1869.

Hallett held a considerable number of Russian bonds, and in the opinion of the Court it was proved that he had in 1877 allotted Russian bonds of the nominal amount of £1554 and £1036, making together £2590, as representing the trust funds under the settlement. The bonds for £1554 he retained in his own hands; and his son, shortly before his death, found them and delivered them to the trustees of the settlement by whom they were sold. The bonds for £1036 were deposited by *Hallett* with his bankers, Messrs. *Twining*, and were afterwards sold as mentioned below.

As to a claim by Mrs. *Cotterill*. *Henry Hughes Hallett* had for many years been employed by Mrs. *Cotterill* as her solicitor, and she had been in the habit of depositing with him securities for money, and in the opinion of the Court it was proved that he had bought or appropriated and did in 1877 hold for her Russian bonds of £450 and £2242, nominal amount. The facts of her case are fully stated in the judgment of Mr. Justice *Fry*.

In November, 1877, *Hallett*, without any authority from the trustees or from Mrs. *Cotterill*, directed his bankers, Messrs. *Twining*, to sell, and they accordingly sold, one of the sets of bonds representing the trust fund and both sets of Mrs. *Cotterill's* bonds. The following entries (with other entries of cash, &c.) appeared to his credit in the books of the bankers:—

		£	*s.*	*d.*
Nov. 3.	Sale £450 Russian 5 per cent. 1871, at 76 less commission	341	8	9
Nov. 14.	Sale £1036 Russian 5 per cent. 1822, at 74½ less commission . . .	770	10	5
„	Sale £2442 Russian 5 per cent. 1822, at 74 less commission	1804	0	7

Hallett had before his death drawn out different sums for his own purposes, so that the balance to his credit at the time of his death (if nothing more had been paid in by him after the 14th of November) would have been £1708 16*s*. He had, however, paid

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in other sums, so that he had at the time of his death, which was in February, 1878, a balance at his bankers of £3029 15*s.* 1*d.*, of which £2600 had been paid into Court to the credit of an action for the administration of his estate.

The trustees of the settlement applied by summons in the action for payment of £770 10*s.* 5*d.* out of the £2600, and for a declaration that the produce of the sale of the bonds for £1554 belonged to them. Mrs. *Cotterill* applied for payment of the £1708 16*s.* balance. A Mrs. *Gatliff* also applied for payment of some of the money as having arisen from the sale of Russian bonds belonging to her. The summonses came on for hearing together before Mr. Justice *Fry* on the 10th of July, 1879.

E. Beaumont, for Mrs. *Cotterill*:—

Mrs. *Cotterill* claims £1708 16*s.* as the sum remaining in the bankers' hands out of the produce of the sales of her £2442 Russian bonds. These bonds were simply deposited with *Hallett*, and he had no right to sell them. He has, however, sold them, but the money can be traced and is ear-marked. He is said to have similarly sold the bonds of his trustees, but if he did so the £770 10*s.* 5*d.* for which he sold them has, like the produce of the sale of Mrs. *Cotterill's* £450, been already drawn out under his cheques, and the balance left is not enough even to satisfy Mrs. *Cotterill's* claim for the produce of her £2442 Russian bonds. That is the rule in *Clayton's Case* (1); *Brown* v. *Adams* (2).

Phear, for Mrs. *Gatliff*.

J. Pearson, Q.C., and *D. Gardiner*, for the trustees of the settlement:—

We claim the £770 10*s.* 5*d.* as the produce of the sale of our Russian bonds, and we also claim the produce of the bonds for £1554. As to the £770 10*s.* 5*d.*, *Clayton's Case* does not apply, as both sums were paid in on the 14th of November; and at all events the remaining money must be rateably apportioned between the trustees and Mrs. *Cotterill*.

(1) 1 Mer. 572. (2) Law Rep. 4 Ch. 764.

Higgins, Q.C., and *B. Fossett Lock*, for the Plaintiff in the suit:—

The applicants have no priority; and this case is exactly like *Ex parte Dale & Co.* (1), which shews that when money has been paid to a general account at a bankers it cannot be followed. *Ex parte Cooke* (2) was different, as the person paying in was a broker. The law is shewn by *Pennell* v. *Deffell* (3) and *Middleton* v. *Pollock* (4).

A. T. Watson, for *Hallett's* executrix, cited *Taylor* v. *Plumer* (5).

FRY, J., after expressing his intention of giving counsel an opportunity of arguing Mrs. *Cotterill's* summons on the cases which had been cited, and after stating the facts as to the claim of *Hallett's* trustees, and deciding that they were entitled to retain the proceeds of the sale of the £1554 Russian bonds, and that they had proved that the Russian bonds for £1036 were part of the trust fund, continued:—

The second question is whether *Clayton's Case* (6) applies. Now, if the matter were unfettered by authority, it would appear to me clear that where a man has a balance to his credit consisting in part of funds which are his own, and which he may lawfully draw out and apply for his own purposes, and in part of funds which he may not lawfully draw out and apply for his own purposes, his drawings for his own purposes ought to be attributed to his own funds, and not to the trust funds. But it appears to me that I am not at liberty, in the existing state of the authorities, to act according to the inclination of my own mind. In *Pennell* v. *Deffell* (7), Lord Justice *Knight Bruce* said, "It may be, however, and, as I think, is true, that cheques drawn by the trustee in a general manner upon the bank would, for every purpose, be ascribed and affect the account in the mode explained and laid down by Sir *W. Grant* in *Clayton's Case*. The principles there stated would, I conceive, be applicable, notwithstanding the different nature and character of the sums

(1) 11 Ch. D. 772.
(2) 4 Ch. D. 123.
(3) 4 D. M. & G. 372.
(4) 4 Ch. D. 49.
(5) 3 M. & S. 562.
(6) 1 Mer. 572.
(7) 4 D. M. & G. 372, 384.

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forming together the balance due from the bank to the trustee, whatever the purposes and objects of the cheques." On that view the Court of Appeal acted, and held that as between the persons who intrusted the testator with trust moneys and his general creditors the claims of the former must prevail. In *Frith* v. *Cartland* (1) Vice-Chancellor *Wood* said, "The Court attributes the ownership of the trust property to the *cestui que trust* so long as it can be traced. Here there is no difficulty in identifying it. Throughout the whole series of transformations the bankrupt always held a fund available to meet the claim of the trust. . . . So long, however, as the fund can be traced, the trustee cannot assert his own title to it." That case was followed by *Brown* v. *Adams* (2), where the trust money paid in had been drawn out, and it was held that it had been appropriated to answer the cheques. The rights of the different parties must be governed by *Clayton's Case* (3).

His Lordship then gave his decision that Mrs. *Gatliff's* claim was not maintained by the evidence.

July 12. *E. Beaumont*, continuing the argument for Mrs. *Cotterill*:—

This case is distinguishable from *Ex parte Dale & Co.* (4), especially as *Hallett* was a trustee for Mrs. *Cotterill*. But even if *Hallett* was only an agent the money can be followed: *Taylor* v. *Plumer* (5). If the money can only be followed in the hands of a trustee, *Brown* v. *Adams* would not have been arguable. In many cases there is a physical difficulty in tracing the money, but when that has been got over the law is clear: *Ex parte Cooke* (6). Why should the trustees of the settlement take the balance? *Hallett* was not a banker, and the moneys were not mixed up in his hands, and each sum can be and has been traced. Even if *Hallett* was not technically trustee for Mrs. *Cotterill* he stood in a fiduciary relation to her, and the result would be the same.

Higgins, in reply, on the cases cited.

(1) 2 H. & M. 417, 422.
(2) Law Rep. 4 Ch. 764.
(3) 1 Mer. 572.
(4) 11 Ch. D. 772.
(5) 3 M. & S. 562.
(6) 4 Ch. D. 123.

Cf Sch Jun MS 138

FRY, J.:—

In this case Mrs. *Cotterill* claims to have such portion of the residue of the balance standing to the credit of the late Mr. *Hallett's* banking account as may be attributable to her after applying the rule in *Clayton's Case* (1) to that account.

For more than twenty years before the death of Mr. *Hallett* in 1878 he had acted as the solicitor for this lady, and in the year 1860 he had purchased for her Russian bonds to the nominal value of £1251, and on the 10th of February, 1868, Mrs. *Cotterill* deposited those bonds with Mr. *Hallett*, together with £1000 stock of the *Midland Waggon Company* of *Birmingham*, and thereupon he gave her a receipt for those bonds. It appears from the evidence before me that Mr. *Hallett* was in the habit of receiving the dividends on these and the other bonds which afterwards came to his hands for safe custody, and paying them to Mrs. *Cotterill*. In March, 1871, the *Midland Waggon Company's* bond was paid off; and it appears that the sum of £1010 9*s*. 4*d*. reached *Hallett's* hands, and on the 23rd of March that was invested in £1184 Russian bonds. I hesitate to say "in the purchase," because it appears that Mr. *Hallett* had at that time in his hands Russian bonds to a considerable amount, and he probably appropriated to her, bonds to the value of £1184, which he acknowledged himself to hold on that day for her safe custody, for on that day he gave her a receipt in these terms, "Received of Mrs. *Amelia Cotterill* for safe custody £1258 Russian bonds of 1862, also £1184 like bonds, the investment of the *Midland Waggon Company's* bond paid off." The result was that he held for her £2442 Russian bonds. It has been said that these Russian bonds were not appropriated; but it appears to me that I am bound to hold that they were appropriated. He gave her that receipt, and there are entries in his books which also support the appropriation by him of certain specific bonds on her behalf. He appears, further, to have received the dividends on the bonds to that extent, and to have paid them to her. In 1871 she further deposited with him some other bonds, including £450 Russian bonds.

So matters went on from 1871 down to 1877. On the 3rd of November, 1877, Mr. *Hallett* sold the £450 Russian bonds through

(1) 1 Mer. 572.

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the intervention of his bankers, Messrs. *Twining*, and the amount produced by that sale was entered in his bankers' book specifically as the produce of the sale of £450 Russian 5 per Cent. Bonds. Then, on the 14th of November, he sold the £2242 bonds which he held for Mrs. *Cotterill*, and he sold on the same day another bond belonging to the trustees of his settlement. The entry in his bankers' book keeps separate those two amounts; and with regard to the amount now claimed by Mrs. *Cotterill*, it is entered as the produce of £2242 5 per Cent. Russian Bonds. The money, therefore, is as clearly ear-marked in the bankers' account as it is possible to be by means of an entry.

Further than that, it is to be borne in mind that *Hallett* charges himself on the 14th of November with a sum of £2994 9*s.* 4*d.* as the produce of Russian bonds, £2442 and £450. And that sum was the exact result of adding together the two sums I have mentioned as passing into his bankers' account. There is, therefore, no doubt that that sum was the produce of Mrs. *Cotterill's* bonds. It is not necessary to say much more than that on the 2nd of February, 1878, Mr. *Hallett* died, leaving a balance of about £3000 at his bankers.

In that state of circumstances the question arises whether Mrs. *Cotterill* is entitled to follow this money. It has been argued that Mr. *Hallett* was a trustee for Mrs. *Cotterill*. In that view I cannot concur; but it appears to me that he was solicitor for her, that he was agent for her, and that he was bailee for her. I think, therefore, that he stood in what has been called a fiduciary relation towards her. Now if he had been merely the agent and bailee, and had received from her an authority to sell these bonds —an authority which, according to the proper interpretation to be put on it by the course of dealing between them, implied a right in him to mix the produce of the sale with his own moneys, I should very probably have held that Mrs. *Cotterill* was merely a creditor of Mr. *Hallett*. But that is not the case here. The authority which she gave him was merely to hold these bonds for her; and the sale of these bonds was, in my judgment, a distinct violation of the duty he had undertaken. Therefore there was no authority from her which would justify him in mixing the produce of the bonds with his own moneys. There was nothing from which

you could infer that she was minded that the property should be converted, or that she would look to him as the mere paymaster of the produce of the securities. Those circumstances, in my judgment, make the case entirely different from the series of authorities to which I referred in *Ex parte Dale & Co.* (1), where I came to the conclusion, rightly or wrongly, that the factor properly converted the goods into money, and that the money got mixed with his own money in accordance with the intention of the parties, and that in such a case the money could not be followed. That appears to me to be the law, both at Common Law and in Equity; some of the decisions to which I then referred being decisions of a Court of Equity. But for the reasons I have indicated, that line of authority does not appear to me to touch this matter, and therefore I think that in this case—finding the fiduciary relationship, and finding the violation of that duty in the manner I have described—I am bound to give Mrs. *Cotterill* the same relief as if Mr. *Hallett* had been a trustee for her. That being so, the result is that she is entitled to follow the balance standing to his credit in his bankers' account, in the manner indicated when I gave judgment on the summons of the trustees.

I will only make this further observation, that it may very well be that the distinction which I have now drawn, and to which necessarily my attention was not so fully directed when I gave judgment in *Ex parte Dale & Co.*, may remove some of the force of the observations which I made at the end of that judgment as to the difficulty of reconciling the other authorities with the case of *Pennell* v. *Deffell* (2).

J. Pearson, Q.C., and *Dundas Gardiner* then claimed that the balance in the bank should be divided rateably between *Hallett's* trustees and Mrs. *Cotterill*. A banker pays the cheques drawn on him out of the general balance, and does not appropriate the money first paid to the first cheque drawn. The rights of claimants cannot depend on the accident of which entry is made first by the banker's clerk. At all events a day cannot be divided, and all payments on one day must be treated as one. Suppose the clerk had entered them on one line. If the cheques are held to

(1) 11 Ch. D. 772. (2) 4 D. M. & G. 372.

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have been paid out of our £770 10*s.* 5*d.* alone, the trustees will get nothing, and all the balance will go to Mrs. *Cotterill*, although she is in the same position as the trustees.

Fry, J., said in the course of the discussion :—

As to the £341 8*s.* 9*d.*, that sum was gone, and Mrs. *Cotterill* would get no part of it. According to *Clayton's Case* (1) the result depends upon the entries. Sir *W. Grant* in that case said: "But this is the case of a banking account where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, This draft is to be placed to the account of the £500 paid in on Monday, and this other to the account of the £500 paid in on Tuesday. There is a fund of £1000 to draw upon, and that is enough. In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other." The difficulty seems to be that the rule in that case has been applied by the Court of Appeal to a case between trustee and *cestui que trust.* I have already stated how I should be inclined to act if I had liberty, but I am not at liberty. It is for the payer to appropriate, but, failing that, the payee may appropriate and may enter the payments as he likes. As between banker and customer the banker is the payee and the customer is the payer, and if the customer says nothing the banker may appropriate. The Courts have said that that principle binds trustee and *cestui que trust.* If the two sums had been entered in one line of a double column, that might have shewn that it was the same sum, but that has not been done. The trustees have failed, and will get nothing.

C. A. From this judgment appeals were brought by the Plaintiff, by the trustees of *Hallett's* settlement, and by Mrs. *Cotterill.*

(1) 1 Mer. 572, 608.

The appeals came on for hearing on the 26th of November, 1879.

The Plaintiff's appeal was heard first.

As to the claim of the trustees of *Hallett's* settlement,

Higgins, Q.C., and *B. Fossett Lock*, for the Plaintiff:—

The trustees have no priority over the general creditors. There is no sufficient evidence that the Russian bonds were purchased with trust money, or that there was any appropriation of them to the trust. The memorandum in the fold of the settlement did not amount to a declaration of trust. It was never communicated to the trustees of the settlement.

J. Pearson, Q.C., and *Dundas Gardiner*, for the trustees of *Hallett's* settlement:—

There is sufficient evidence of the appropriation of Russian bonds to the trusts of the settlement. It was *Hallett's* duty to invest the fund, and less evidence is required in the case of a person who is bound to appropriate than in the case of one who is not. The memorandum is a good declaration of trust by *Hallett*: at all events it is an admission against his own interest: *In re Strahan* (1).

Higgins, in reply.

THE COURT reserved judgment on this claim.

As to Mrs. *Cotterill's* claim,

Higgins, Q.C., and *B. Fossett Lock*, for the Plaintiff:—

In this case *Hallett* was not a trustee at all. He was a mere bailee of Mrs. *Cotterill's* money. He was not even in a fiduciary position. Therefore the money cannot be followed into his hands. The fact of his receiving the dividends for her makes no difference. A banker does not become a trustee because bonds are deposited with him, but he may receive the coupons: *Ex parte Dale & Co.* (2); *Scott* v. *Surman* (3); *Whitecomb* v. *Jacob* (4).

[JESSEL, M.R.:—The decision in *Whitecomb* v. *Jacob* is based

(1) 8 D. M. & G. 291.
(2) 11 Ch. D. 772.
(3) Willes, 400.
(4) 1 Salk. 161.

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upon a wrong reason. It is said there, "In regard that money has no ear-mark, equity cannot follow that in behalf of him that employed the factor." It has been often held since that money may be ear-marked.]

De Gex, Q.C., and *E. Beaumont*, for Mrs. *Cotterill*, were not called on.

Dec. 3. The judgments on these two claims were delivered this day.

CLAIM OF THE TRUSTEES OF HALLETT'S SETTLEMENT.

JESSEL, M.R.:—

In the first appeal from Mr. Justice *Fry* the question is purely one of facts, or rather, as there is no dispute about the facts, what is the proper inference to be derived from the undisputed facts. Substantially the question is whether a considerable sum of trust money was invested by *Hallett* along with other trust money in the purchase of £2590 Russian bonds. Mr. Justice *Fry* has come to the conclusion that it was, and I am not disposed to differ from him. *Hallett* was a solicitor, and the case unfortunately presents one more instance of a solicitor betraying his trust; and the question is whether his numerous other clients, whose money he had misappropriated, or the trustees of his marriage settlement, whose money he had also misappropriated, are to suffer. The trust money appears to have been invested by *Hallett* at first in some mortgages. That was not made payable to the trustee, but to *Hallett*, and he received the interest, as he was entitled to do under the settlement, during his life. The last mortgage on which the money was invested was on the estate of a Mr. *Walker*. That mortgage was paid off in 1869. *Hallett* received the money. What he did with it is not clear, but there can be no doubt he appropriated it in some way to his own use. He had in his possession a large quantity of Russian bonds, and among them the £2590 Russian bonds in question, and whereas he used before 1870 to enter the interest on them in a lump sum, he now carried the bonds for £2590 to a separate account, and made entries of them as "self trust," entering the interest separately from the

interest on the other bonds. At some time or other he made a memorandum in the fold of the draft of his marriage settlement which contained this sentence: "The money remained in *Great George Street* until September, 1865, when it was invested in *Walker's* estate. *Walker's* mortgage was paid off in November, 1870, and invested in £2590 Russian £5 per Cent. Stock." This being in his handwriting is evidence against him. There is in addition this singular fact. He took to his bankers a large quantity of Russian bonds in two parcels. The envelope of one parcel has not been found, but the envelope of the other has an indorsement on it shewing that it contained bonds for £2412, the correct amount of bonds which he held in trust for another person, Mrs. *Cotterill;* and this amount, added to the bonds for £2590 claimed by *Hallett's* trustees, would make up the £5032 which he deposited on that occasion. When you see that he had other Russian bonds of his own, and took out some and deposited them in separate parcels, and that one of those parcels contained bonds held by him in a fiduciary relation, we may conclude that the other parcel was kept separate for no other purpose but appropriation. This is a circumstance corroborating the statement in his own handwriting. I am therefore of opinion that the trustees are entitled to the bonds which they claim, and are entitled to the produce of the sale of them. The judgment of Mr. Justice *Fry* on this point must therefore be affirmed.

BAGGALLAY and THESIGER, L.JJ., concurred.

CLAIM OF MRS. COTTERILL.

JESSEL, M.R.:—

The second appeal from Mr. Justice *Fry* in this case raises, in my opinion, not a question of fact, for the fact is indisputable, but a question of law of very considerable importance. The facts necessary to be stated are very few. A Mrs. *Cotterill* either had some money, which Mr. *Hallett* had invested for her in the purchase of Russian bonds, which I think is the more probable version of the transaction, for her memory does not appear to be very accurate, or she had some Russian bonds which he had de-

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livered to her and she re-delivered to him; it is utterly immaterial. What is proved in the case is that he gave her a receipt, which of course is binding against him and his estate, for a *Russian Bond and Waggon Company* debenture bonds. It appears that he had bonds to that amount in his possession, and it also appears that the exact amount was deposited by him with his bankers in a separate parcel in 1873. I think Mrs. *Cotterill* is not called upon to prove any more, and therefore as against Mr. *Hallett* and his legal personal representative these bonds are her bonds deposited with Mr. *Hallett*, according to the receipt, for safe custody, which would make him, no doubt, an ordinary bailee. In addition to that, it appears that Mr. *Hallett* was in the habit of receiving the income arising from these bonds on behalf of Mrs. *Cotterill*. I suppose he or the bankers cut off the coupons, and he received the money and accounted for the exact amount to her every half year. This receivership, of course, was the receivership of an agent—it was as bailee; therefore he was bailee of the bonds, and an agent to receive the dividends on the bonds. There is no doubt, therefore, that Mr. *Hallett* stood in a fiduciary position towards Mrs. *Cotterill*. Mr. *Hallett*, before his death, I regret to say, improperly sold the bonds and put the money to his general account at his bankers. It is not disputed that the money remained at his bankers mixed with his own money at the time of his death; that is, he had not drawn out that money from his bankers. In that position of matters Mrs. *Cotterill* claimed to be entitled to receive the proceeds, or the amount of the proceeds, of the bonds out of the money in the hands of Mr. *Hallett's* bankers at the time of his death, and that claim was allowed by the learned Judge of the Court below, and I think was properly so allowed. Indeed, as I understand the doctrines of Equity, it would have been too clear a case for argument, except for another decision of that learned Judge himself, *Ex parte Dale & Co.* (1). The modern doctrine of Equity as regards property disposed of by persons in a fiduciary position is a very clear and well-established doctrine. You can, if the sale was rightful, take the proceeds of the sale, if you can identify them. If the sale was wrongful, you can still take the proceeds of the sale, in a sense adopting the sale for the purpose of

(1) 11 Ch. D. 772.

taking the proceeds, if you can identify them. There is no distinction, therefore, between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds. But it very often happens that you cannot identify the proceeds. The proceeds may have been invested together with money belonging to the person in a fiduciary position, in a purchase. He may have bought land with it, for instance, or he may have bought chattels with it. Now, what is the position of the beneficial owner as regards such purchases? I will, first of all, take his position when the purchase is clearly made with what I will call, for shortness, the trust money, although it is not confined, as I will shew presently, to express trusts. In that case, according to the now well-established doctrine of Equity, the beneficial owner has a right to elect either to take the property purchased, or to hold it as a security for the amount of the trust money laid out in the purchase; or, as we generally express it, he is entitled at his election either to take the property, or to have a charge on the property for the amount of the trust money. But in the second case, where a trustee has mixed the money with his own, there is this distinction, that the *cestui que trust*, or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust-money simply and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased, for the amount of the trust-money laid out in the purchase; and that charge is quite independent of the fact of the amount laid out by the trustee. The moment you get a substantial portion of it furnished by the trustee, using the word "trustee" in the sense I have mentioned, as including all persons in a fiduciary relation, the right to the charge follows. That is the modern doctrine of Equity. Has it ever been suggested, until very recently, that there is any distinction between an express trustee, or an agent, or a bailee, or a collector of rents, or anybody else in a fiduciary position? I have never heard, until quite recently, such a distinction suggested. It cannot, as far as I am aware (and since this Court sat last to hear this case, I have taken the trouble to look for authority), be found in any reported case even suggested, except in the recent decision of Mr. Justice *Fry*, to which I shall draw attention presently. It can have no foundation in principle,

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because the beneficial ownership is the same, wherever the legal ownership may be. If you have goods bargained and sold to a man upon trust to sell and hand over the net proceeds to another, that other is the beneficial owner; but if instead of being bargained and sold, so as to vest the legal ownership in the trustee, they are deposited with him to sell as agent, so that the legal ownership remains in the beneficial owner, can it be supposed, in a Court of Equity, that the rights of the beneficial owner are different, he being entire beneficial owner in both cases? I say on principle it is impossible to imagine there can be any difference. In practice we know there is no difference, because the moment you get into a Court of Equity, where a principal can sue an agent as well as a *cestui que trust* can sue a trustee, no such distinction was ever suggested, as far as I am aware. Therefore, the moment you establish the fiduciary relation, the modern rules of Equity, as regards following trust money, apply. I intentionally say modern rules, because it must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented. Take such things as these: the separate use of a married woman, the restraint on alienation, the modern rule against perpetuities, and the rules of equitable waste. We can name the Chancellors who first invented them, and state the date when they were first introduced into Equity jurisprudence; and, therefore, in cases of this kind, the older precedents in Equity are of very little value. The doctrines are progressive, refined, and improved; and if we want to know what the rules of Equity are, we must look, of course, rather to the more modern than the more ancient cases.

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Now that being the established doctrine of Equity on this point, I will take the case of the pure bailee. If the bailee sells the goods bailed, the bailor can in Equity follow the proceeds, and can follow the proceeds wherever they can be distinguished, either being actually kept separate, or being mixed up with other

moneys. I have only to advert to one other point, and that is this—supposing, instead of being invested in the purchase of land or goods, the moneys were simply mixed with other moneys of the trustee, using the term again in its full sense as including every person in a fiduciary relation, does it make any difference according to the modern doctrine of Equity? I say none. It would be very remarkable if it were to do so. Supposing the trust money was 1000 sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag. Could anybody suppose that a Judge in Equity would find any difficulty in saying that the *cestui que trust* has a right to take 1000 sovereigns out of that bag? I do not like to call it a charge of 1000 sovereigns on the 1001 sovereigns, but that is the effect of it. I have no doubt of it. It would make no difference if, instead of one sovereign, it was another 1000 sovereigns; but if instead of putting it into his bag, or after putting it into his bag, he carries the bag to his bankers, what then? According to law, the bankers are his debtors for the total amount; but if you lend the trust money to a third person, you can follow it. If in the case supposed the trustee had lent the £1000 to a man without security, you could follow the debt, and take it from the debtor. If he lent it on a promissory note, you could take the promissory note; or the bond, if it were a bond. If, instead of lending the whole amount in one sum simply, he had added a sovereign, or had added £500 of his own to the £1000, the only difference is this, that instead of taking the bond or the promissory note, the *cestui que trust* would have a charge for the amount of the trust money on the bond or promissory note. So it would be on the simple contract debt; that is, if the debt were of such a nature as that, between the creditor and the debtor, you could not sever the debt into two, so as to shew what part was trust money, then the *cestui que trust* would have a right to a charge upon the whole. Therefore, there is no difficulty in following out the rules of Equity and deciding that in a case of a mere bailee, as Mr. Justice *Fry* has decided, you can follow the money.

Having said so much, I feel bound to say something about the authorities, and for two reasons. First of all, this decision of Mr. Justice *Fry's* to which I have referred is reported, and, there-

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fore, in my opinion, may do mischief if not corrected; and, secondly, because it appears to me, speaking with the greatest possible respect of such an eminent master of Equity as Mr. Justice *Fry*, that he has entirely misconceived the proper use of authorities in holding himself to be bound by a long line of authorities, to decide against that which he saw most clearly was good equity; in other words, he decided against his own opinion as to the rules of Equity, in obedience, as he thought, to a series of authorities, opposed, as he conceived, to all principle, because he thought he was bound so to do, as it appears to me, in utter oblivion of what I will take the liberty of stating is the right mode of viewing authorities, and also in oblivion of that salutary provision of the *Judicature Act* which says that where there is a difference between the principles of Law and Equity, the rules of Equity are to prevail.

First of all, what is the proper use of authorities? This is almost elementary, but I am bound to state it, because, as I will shew presently, that use has not been made in the case on which I am going to comment. The only use of authorities, or decided cases, is the establishment of some principle which the Judge can follow out in deciding the case before him. There is, perhaps, nothing more important in our law than that great respect for the authority of decided cases which is shewn by our tribunals. Were it not for that our law would be in a most distressing state of uncertainty; and so strong has that been my view, that where a case has decided a principle, although I myself do not concur in it, and although it has been only the decision of a tribunal of co-ordinate jurisdiction, I have felt bound to follow it where it is of respectable age and has been used by lawyers as settling the law, leaving to the Appellate Court to say that case is wrongly decided, if the Appellate Court should so think.

Now when we come to look at the case which was before Mr. Justice *Fry*, the case of *Ex parte Dale & Co.* (1), we shall find him saying this: "Does it make any difference that instead of trustee and *cestui que trust* it is a case of fiduciary relationship? What is a fiduciary relationship? It is one in respect of which, if a wrong arise, the same remedy exists against the wrongdoer on

(1) 11 Ch. D. 772, 778.

behalf of the principal as would exist against a trustee on behalf of the *cestui que trust.* If that be a just description of the relationship, it would follow that wherever fiduciary relationship exists, and money coming from the trust lies in the hands of persons standing in that relationship, it can be followed and separated from any money of their own. That seems to me to be the logical result of *Pennell* v. *Deffell*" (1). Up to that point I agree with every syllable, and I think it would be impossible to express the doctrine more clearly than it is there expressed by Mr. Justice *Fry.* But now comes the unfortunate result, "but that result is opposed to the long line of authorities to which I have referred, and from which I do not feel myself justified upon any reasoning of my own in departing." So he here decided the case wrongly and against his own opinion and against the case of *Pennell* v. *Deffell* in deference to a long line of authorities. That being so, I feel bound to examine his supposed long line of authorities, which are not very numerous, and shew that not one of them lends any support whatever to the doctrine or principle which he thinks is established by them.

The first case is the well-known case of *Whitecomb* v. *Jacob* (2). I may say the cases are so fully extracted, if I may use the word, in Mr. Justice *Fry's* judgment as regards the material portions of them, that it is more convenient to read them from that than it is from the reports themselves, which I have looked at. "If one employs a factor and entrusts him with the disposal of merchandise, and the factor receives the money and dies indebted in debts of a higher nature, and it appears by evidence that this money was vested in other goods and remains unpaid, those goods shall be taken as part of the merchant's estate and not the factor's" (that is, you may follow the money or the goods); "but if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of a superior creditor, &c.; for, in regard that money has no ear-mark, Equity cannot follow that in behalf of him that employed the factor" (3). Now let us see, therefore, what *Whitecomb* v. *Jacob* decides. It decides that the equity as to following the proceeds attaches to the case of a factor

(1) 4 D. M. & G. 372. (2) 1 Salk. 161.
(3) 1 Ch. D. 775.

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as well as to the case of *cestui que trust* and trustee. That is what it decides; but it decides, secondly, that you could not follow money because it had no ear-mark. The first part is good law at the present day; the second is not. Whether it was good law or not at the time of *Salkeld* it is immaterial to consider. It is very doubtful whether Equity had got quite so far at that date as since, and therefore I will not say it was not: but it is not so now. The first part is good law and the second part is not, and therefore *Whitecomb* v. *Jacob* (1) is no authority at all on the second point on which it was decided, and so Mr. Justice *Fry* said. Then Mr. Justice *Fry* proceeds in his judgment to say, "Now, with the single exception that it appears to have been held subsequently that money may be so far ear-marked that it may be followed if it has been kept separate, that case appears to have been always held to be an authority;" that is to say, with the single exception that the sole ground for the decision has been overruled, it is to be an authority! Did ever any one hear anything, if I may say so, so extraordinary as such a comment on an old case? The sole ground of that decision was that, although as a general rule you may follow the proceeds as against the factor, as you may against the trustee in Equity, yet, because money has no ear-mark, you cannot follow it. That is overruled, and still the Judge holds it to be an authority. It appears to me no authority at all, the sole ground of the decision having been long since overruled—indeed it was overruled by some of the authorities which Mr. Justice *Fry* cites. He goes on, "In the celebrated case of *Ryall* v. *Rolle* (2) Mr. Justice *Burnet,* in delivering judgment, says: 'Suppose goods are consigned to a factor who sells them and breaks, the merchant for the money must come in as a creditor under the commission; but if the money is laid out in other goods these goods will not be subject to the bankruptcy.'" It is the same as *Whitecomb* v. *Jacob.* You may follow the goods, but you cannot follow the money. That is no longer law. In bankruptcy no part of the law is better settled than that if the money be kept separate it does not fall into the general estate. It has been decided by a long line of cases in bankruptcy, and there is no doubt about it if it is kept separate; but Mr. Justice *Burnet* only said what was said in the

(1) 1 Salk. 161. (2) 1 Atk. 165.

case in *Salkeld;* the notion being that you could not follow money, a notion which was prevalent at that time. That part of *Ryall* v. *Rolle* (1) is as much overruled as the case of *Whitecomb* v. *Jacob* (2). But it is to be observed that the Judges thought then that you could not follow money in Equity, not that you could not follow it between principal and agent or merchant and factor, they thought that you could not follow it at all, even as between trustee and *cestui que trust,* because money had no ear-mark. It is not an authority for a distinction between the case of principal and agent and the case of *cestui que trust* and trustee; it is an authority, if it is an authority for anything, that you cannot follow money in that way. Then Mr. Justice *Fry* says, "In another case of *Ex parte Dumas* (3), before Lord *Hardwicke,* the petitioners were certain persons who had claimed bills arising from the produce of certain goods transmitted to them, and the Lord Chancellor said: 'Suppose the petitioners had consigned over goods to *Jullian* as their factor, and he had sold them and turned them into money, the principal then could only have come in as a general creditor under the commission; but if the goods had continued in specie and had been found in *Jullian's* hands at the time of his bankruptcy, it would have been otherwise, and has been so determined in several cases.'" There it is to be noticed that the expression is "turned them into money," but nothing is said about the money being kept separate or not. I looked into the late Mr. *Lewin's* book on Trustees to see what he said about this case, because it is very odd that Lord *Hardwicke* should say so, and what Mr. *Lewin* says is that it seems in the time of Lord *Hardwicke* it was supposed that you could not follow money in Equity, which perhaps is the explanation, namely, that the doctrine is more modern than his decision. This is certainly not law now. As I said before there is no doubt in bankruptcy if the money is kept separate it can be followed; but it is the same proposition. It is not as if there were any difference between the position of factor and the position of trustee, but it is that you cannot follow the money. That he treats as well ascertained law at that time. Then Mr. Justice *Fry* goes on to say this, "Mr. Justice *Willes,* in delivering the considered

(1) 1 Atk. 165. (2) 1 Salk. 161.

(3) 1 Atk. 232.

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judgment of the Court of Common Pleas in the case of *Scott* v. *Surman* (1)"—I do not understand that a judgment is any better for being held over a long time, for I think judgments are perhaps best if delivered when the facts are fresh in the Judge's mind; but I do not say that they are either better or worse—"says: 'We are all agreed that if the money for which the tar had been sold had been all paid to the bankrupt before his bankruptcy, and had not been laid out again by him in any specific thing to distinguish it from the rest of his estate, in that case the Plaintiffs could not have recovered anything in this action, but must have come in as creditors under the commission, as is laid down in the case of *Whitecomb* v. *Jacob* (2) and in many other cases.'"

Now, first of all, that is merely a *dictum* of that very eminent Judge, Mr. Justice *Willes*, and he has not adverted to the distinction between money ear-marked and money not ear-marked. He has simply quoted from *Whitecomb* v. *Jacob* without considering it at all. If you read it literally, it means if it has not been laid out on any specific thing. Now that was not law in his time in bankruptcy, and I am quite sure if Mr. Justice *Willes*' attention had been called to the phrase used he would have said it was too general. If the money had been laid aside by the bankrupt, and put into a bag, and marked, you could take the money. I think Mr. Justice *Willes* would have qualified it. It is a mere *dictum*, and it really only follows *Whitecomb* v. *Jacob*. Then Mr. Justice *Fry* says: "In the year 1800 the Lord Chancellor, in *Ex parte Sayers* (3), adopted the same view." That was Lord *Thurlow*. "He considered that there were in that case special circumstances which shewed that, although the money had got into the general fund constituting the estate of the bankrupt, it had got out again; and he said it had acquired an identity and a distinction from the rest of the fund. Still he adopted the general principle that if it had been in the form of money at the time of the bankruptcy, the creditor could only rank with the other creditors." It is quite true he said so, but again the same observation applies. He states it generally on the supposition of the factor having turned the goods into money, without distinguishing between the cases of the

(1) Willes, 400. (2) 1 Salk. 161.
(3) 5 Ves. 169.

money being kept separate and the cases where it was mixed with his own, and could not be followed.

Now we come to a case which I am glad to say is the last—the well-known case of *Taylor* v. *Plumer* (1), where we have the decision of a great Judge, no doubt, Lord *Ellenborough;* and there he entirely throws over all the prior decisions as to money not ear-marked not being followed. At that time it was well known it could be ear-marked in Equity; and therefore when you come to look at it you will find it an express decision in conflict with all the others cited as to the ear-marking of money. Lord *Ellenborough* says this: "It makes no difference in reason or law into what other form different from the original the change may have been made"—there I agree with him most cordially in reason and in law—"whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in *Scott* v. *Surman* (2)"—and I say whether it be a simple contract debt or not it is the same thing—"or into other merchandise, as in *Whitecomb* v. *Jacob* (3), for the product of or substitute for the original thing still follows the nature of the thing itself as long as it can be ascertained to be such." That, if I may say so, is law at the present moment; and though I cannot say it always was law, it always ought to have been law, because it is consonant with principle. Now comes the point, "and the right only ceases when the means of ascertainment fail." That is correct. Now there comes a point which is not correct, but which I am afraid only ceases to be correct because Lord *Ellenborough's* knowledge of the rules of Equity was not quite commensurate with his knowledge of the rules of Common Law, "which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description." He was not aware of the rule of Equity which gave you a charge—that if you lent £1000 of your own and £1000 trust money on a bond for £2000, or on a mortgage for £2000, or on a promissory note for £2000, Equity could follow it, and create a charge; but he gives that, not as law—the law is that it only fails when the means of ascertainment fail—he gives it as a case

(1) 3 M. & S. 562. (2) Willes, 400.
(3) 1 Salk. 161.

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in which the means of ascertainment fail, not being aware of this refinement of Equity by which the means of ascertainment still remain. With the exception of that one fact, which is rather a fact than a statement of law, the rest of the judgment is in my opinion admirable. It goes on: "The difficulty which arises in such a case is a difficulty of fact, and not of law, and the *dictum* that money has no ear-mark must be understood in the same way, *i.e.*, as predicated only of an undivided and undistinguishable mass of current money." There, again, as I say, he did not know that Equity would have followed the money, even if put into a bag or into an undistinguishable mass, by taking out the same quantity.

Now, I have finished the authorities cited by Mr. Justice *Fry*. Is there one of them (and I say there is not) which suggests there is any difference in the position of the factor and the position of the trustee as regards following money? So far from that being the case, they all proceed on the ground that there is no such distinction, and the only reason of the difficulty was that which was so lucidly expressed by Lord *Ellenborough*, the difficulty of ascertainment.

Now I come, before parting with the case, to the decision of *Pennell* v. *Deffell* (1), which is an Equity case decided by the Court of Appeal in Chancery, and therefore of as high authority as any of those cases cited, and of greater weight, because it is more modern than the decisions of Lord *Hardwicke* and Lord *Thurlow;* and, if inconsistent with them, would have overruled them. What is said in *Pennell* v. *Deffell?* Lord Justice *Knight Bruce* there supposes the case of a trust fund kept separate, and he then refers to the case of a trust fund mingled with the other money; that is, if the trustee in the case I suppose put the money in a box with his other money, it would make no difference to the *cestui que trust* except that he would have the right to take the first money out of the box; and then he says, "But not in either case, as I conceive, would the blending together of the trust moneys, however confusedly, be of any moment as between the various *cestuis que trustent* on the one hand and the executors, as representing the general creditors, on the other."

Now, in addition to that, I will only refer to one other case. It

(1) 4 D. M. & G. 372.

is a very good case, and it is again the decision of a well-known Equity Judge, whom we are delighted still to have living among us. It is the case of *Frith* v. *Cartland* (1).] I will read the marginal note: "The rules as to following trust funds in the hands of a defaulting trustee apply against the assignees of a defaulting trustee as fully as against the trustee himself" (that is, they apply in bankruptcy as well as they do on death), "and the circumstance that the trust fund was acquired on the eve of the bankruptcy, and when the bankrupt was about to abscond with that and his other moneys: held, not to raise any equity in favour of the assignees." Now I read that because the man, as it will be seen, was an agent, and Vice-Chancellor *Wood* never dreamt it made any difference, nor anybody else. The facts of the case are these. [His Lordship then referred to the facts as stated in the report, and continued:—] Now the Vice-Chancellor says this (2): "*Pennell* v. *Deffell* (3) is a very instructive case upon all questions of this kind." I am citing the case for the next remark which, I think, would have presented itself to Mr. Justice *Fry*. "It does not, indeed, lay down any new principle, but it contains a particularly clear and able enunciation of established doctrines in their bearing upon circumstances of some difficulty. The guiding principle is, that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether there remains nothing to be the subject of the trust. But so long as the trust property can be traced and followed into other property into which it has been converted that remains subject to the trust. A second principle is, that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own," that is, that the trust property comes first. Now, I think it would have been well if this, which was stated as established Equity law in *Frith* v. *Cartland* by Vice-Chancellor *Wood*, had been accepted and adopted in the case of *Ex parte Dale & Co.* (4). Then he says: "If a man has £1000 of his own in a box on one side and £1000 of trust property in the same box on the other side, and then takes out £500 and applies it to his own

(1) 2 H. & M. 417. (3) 4 D. M. & G. 372.
(2) Ibid. 420, 421. (4) 11 Ch. D. 772.

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purposes, the Court will not allow him to say that that money was taken from the trust fund. The trust must have its £1000 so long as a sufficient sum remains in the box. So here, *Edwards* could not be allowed to say that the £284 deposited in the *Bank of England* was his own, and that the trust portion of the fund was that which he took abroad with him, and from which he drew as he required for his own purposes. There is therefore no difficulty in treating that sum at the bank as belonging to the trust together with what remains of the sum which he took abroad."

I think after those authorities it must now be considered settled that there is no distinction, and never was a distinction, between a person occupying one fiduciary position or another fiduciary position as to the right of the beneficial owner to follow the trust fund, and that those cases which have been cited at Law so far from establishing a distinction, establish the contrary; and that the mere error of supposing that Equity could not follow or distinguish money in the cases supposed, if error it was, and perhaps it was not so originally (I am not sure that the doctrine of equity had got so far at the first start, but it was certainly an error at a later period), is attributable really to the fact that the Judges who followed the earlier cases were not aware of what I may call the gradual refinement of the doctrine of equity. Therefore, looking at the authorities to find out the principle, you do not find out any such distinction established as that suggested by Mr. Justice *Fry*, or anything of the kind even mentioned in them; and I do not know of anything more mischievous than for a Judge to say, "The cases before me establish no principle, but they quite establish something else which I will now enunciate, and therefore hold myself bound by those cases to establish another principle which was never suggested or thought of by the Judges who decided the original cases." It is only out of my great respect and esteem for the learned Judge from whom this appeal comes that I have thought it right to go so fully into the cases to shew that there is no foundation whatever for the suggested distinction, and therefore his decision in this case rests on no trivial or slight distinction between this case and the case of *Ex parte Dale & Co.* (1), but is grounded on the well-ascertained doctrines of equity.

(1) 11 Ch. D. 772.

Before I part with the case I will only say a word or two more. There was cited to Mr. Justice *Fry* a decision of the Appeal Court. It is reported in a note to the case of *Ex parte Dale & Co.* (1), and the name of it is *Birt* v. *Burt*. That was a case of money put into the bank. The only reason why I have not referred to it in the course of my judgment is, that I took part in the decision of the appeal, together with Chief Justice *Coleridge* and Lord Justice *Baggallay*, and we considered the case too clear for argument, and dismissed the appeal with costs.

BAGGALLAY, L.J. :—

I am also of opinion that this appeal should be dismissed. It appears to me sufficient, to support the conclusion at which I have arrived, to say that I entirely agree with Mr. Justice *Fry* in opinion that, upon the facts and the law of the case, *Hallett* stood in a fiduciary position, that he violated his duty, that Mrs. *Cotterill* consequently had the same right to relief against him as if he had been a trustee under the more common designation of the term, and that under those circumstances she had a right to follow the produce of the sale of the bonds. Nor should I have thought it necessary to have at all adverted to the case of *Ex parte Dale & Co.*, which had been previously decided by Mr. Justice *Fry*, had it not been that the Master of the Rolls has very closely examined the judgment in that case, and expressed his disapprobation of the decision arrived at. Now I cannot forget that *Ex parte Dale & Co.* is a decision of very recent date, and that it may possibly come before the Court of which I am a member by way of appeal; and for this reason I should desire to keep my mind as free from any bias or prejudice upon it as possible; but at the same time, so far as the grounds of the decision in that case appear in the printed report of the judgment, and accepting that report as being perfectly and in all respects correct, I think it right to express an opinion upon it. It must be borne in mind that Mr. Justice *Fry* arrived at the conclusion, at which he did arrive in that case, with much hesitation, and that he apparently would have arrived at a different conclusion, had he not felt himself bound by certain authorities, to which he alluded,

(1) 11 Ch. D. 772.

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and from which he stated that he did not feel himself justified in departing, though he regarded them as inconsistent with the general principles of equity applicable to cases involving fiduciary relationship. Assuming there to have been nothing more in the case than appears in the printed report, I feel bound to say that I cannot concur in the view expressed by Mr. Justice *Fry* as to the binding character of the authorities to which he referred.

THESIGER, L.J. :—

The facts of this case are undisputed, and the inference to be drawn from them is so clear, that I need say no more than that I entirely agree with the view that was taken by Mr. Justice *Fry* with reference to that inference. With regard to the law applicable to the case, we have had an elaborate exposition of that law from the Master of the Rolls, and in the main features of that exposition I entirely agree; but I must add, at the same time, that the principles which have been laid down to-day are no new principles, and have been laid down recently in this Court, not only in the case to which the Master of the Rolls has referred of *Birt* v. *Burt* (1), but also in the case of *Ex parte Cooke* (2). If the judgment of Lord Justice *Bramwell* is looked at in that case, it will appear that even to the mind of a Common Law Judge the principles of law which have been applied now for some time in Equity have been made perfectly plain. It has been established for a very long period, in cases at Law as well as in cases in Equity, that the principles relating to the following of trust property are equally applicable to the case of a trustee, using the term in the narrow and technical sense which is applied to it in the Court below, and to the case of factors, bailees, or other kinds of agents. It has been also established, and for a long period, and I think, notwithstanding the observations of the Master of the Rolls that that has been present to the mind of the Common Law Judges as well as to the mind of Equity Judges, that those principles may, under certain circumstances, be applicable to money as well as to specific chattels. The principle of law may be stated, as it appears to me, in the form of a very simple, although at the same time very wide and general proposition. I would state that proposition in these

(1) 11 Ch. D. 773, n. (2) 4 Ch. D. 123.

terms, namely, that wherever a specific chattel is intrusted by one man to another, either for the purposes of safe custody or for the purpose of being disposed of for the benefit of the person intrusting the chattel; then, either the chattel itself, or the proceeds of the chattel, whether the chattel has been rightfully or wrongfully disposed of, may be followed at any time, although either the chattel itself, or the money constituting the proceeds of that chattel, may have been mixed and confounded in a mass of the like material. I may say that that proposition, wide as it is, was adopted almost in those terms by Lord Justice *Bramwell* in the case to which I have referred. There is no doubt that there are to be found here and there in the books, *dicta*, principally of Common Law Judges, which would appear to militate against the generality of that proposition, and which would appear to shew that in the minds of those Judges there was the view, that while chattels might be followed, or money so long as it could be looked upon as a specific chattel, as moneys numbered and placed in a bag, yet when those moneys had been mixed with other moneys that there was no ear-mark, and neither at Law nor in Equity could they be followed. With reference, however, to those *dicta*, it appears to me there are two observations to be made. In the first place I cannot find any decision which has followed out those *dicta* to their consequence, assuming that those *dicta* are to be treated as having the generality which at first sight attaches to them. And, in the second place, it appears to me that in many cases those *dicta*, looking to the facts of the particular case, may be restrained to those facts, and possibly may have a more limited meaning than that which has been attached to them by Mr. Justice *Fry* in the case of *Ex parte Dale & Co.* (1), or by the Master of the Rolls in his judgment in the present case. As far as I can judge, the only exception to the general proposition which I have stated is not a real exception, but an apparent exception, for all cases where it has been held that moneys mixed and confounded, but still existing, in a mass cannot be followed, may, I think, be resolved into cases where, although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no

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duty in reference to the moneys themselves beyond the ordinary duty of a man to pay his debts; in other words, that they were cases where the relationship of debtor and creditor had been constituted, instead of the relation either of trustee and *cestui que trust*, or principal and agent. I think it unnecessary, and to my mind it is undesirable, to give an opinion upon the case of *Ex parte Dale & Co.* (1) until we see upon a case properly brought upon appeal, and when it is necessary to decide the point, whether that case does or does not come within the exception to which I have referred.

The appeals of the trustees of *Hallett's* settlement and Mrs. *Cotterill* were then heard.

J. Pearson, Q.C., and *Dundas Gardiner*, for the Appellants:—

We appeal from so much of Mr. Justice *Fry's* order as directed that the claim of the trustees is to be governed by *Clayton's Case* (2). Mrs. *Cotterill* appeals from the same decision, and if the Court allows the appeal, the balance left to *Hallett's* credit at his bankers will be sufficient for both of us; but if the Court is against us, a further question will arise as to the division of what is applicable to our claims between us and Mrs. *Cotterill*.

We contend, then, that the rule in *Clayton's Case*, by which the earliest drawings are to be appropriated to the earliest payments, does not apply to a case like this, in which trust moneys were mixed with the customer's own moneys. It is only a general rule based on a presumption of law which may be rebutted by the intention of the parties or the circumstances: *City Discount Company* v. *McLean* (3). It is well settled that if an act which has been done may have been done honestly, the man who does it cannot say that he has done it dishonestly. If a man mixes his own money with trust money, and draws some out, he must be taken to have drawn out his own money, and cannot be allowed to say that he has stolen the money deposited with him: *Pinkett* v. *Wright* (4); *Ex parte Kelly & Co.* (5). There is no difference in

(1) 11 Ch. D. 772.
(2) 1 Mer. 572.
(3) Law Rep. 9 C. P. 692.
(4) 2 Hare, 120.
(5) 11 Ch. D. 306.

principle between money kept by a trustee himself, and any deposits by him at a banker's to his own account. Mr. Justice *Fry* agreed with us in principle, but felt himself bound by the authority of *Pennell* v. *Deffell* (1). But the decision of the Lords Justices on that particular point is not borne out by the principles stated by them in the rest of their judgment. At all events this Court is not bound to follow that decision if it is contrary to the principles on which the Court has always acted.

De Gex, Q.C., and *E. Beaumont*, for Mrs. *Cotterill*, supported the same view.

Higgins, Q.C., and *B. Fossett Lock*, for the Plaintiff:—

The point in dispute was solemnly decided in *Pennell* v. *Deffell* after full argument, and this Court is bound by that authority. The principle of the decision has been recognised in subsequent cases: *Merriman* v. *Ward* (2); *Ex parte Dickin* (3); *Hooper* v. *Keay* (4); *Frith* v. *Cartland* (5); *Brown* v. *Adams* (6); *Middleton* v. *Pollock* (7); *Ex parte Cooke* (8). That decision was consistent with the law as previously recognised. The appropriation of payments is a question of fact, and is the same in Equity as Law. If one party wishes to appropriate, he must communicate his election to the other party: *Simson* v. *Ingham* (9). If neither party appropriates, the earliest sums paid and repaid are set against one another. There is a broad distinction between sovereigns placed in a bag and money deposited with a banker. The latter ceases to exist in specie, and becomes a debt due from the banker. The principle of following trust money has never been carried to this extent. *Lord Chedworth* v. *Edwards* (10) is a distinct authority against it. If you can follow trust money into a banker's account, where can you stop? The account might be carried back to any length of time. The Plaintiff, who is a creditor of *Hallett*, is not estopped from saying that *Hallett* acted dishonestly, even though *Hallett* may have been estopped himself.

(1) 4 D. M. & G. 372, 384. 18 Jur. 275.
(2) 1 J. & H. 371.
(3) 8 Ch. D. 377, 384.
(4) 1 Q. B. D. 178.
(5) 2 H. & M. 417. 11 Jur. N.S. 239
(6) Law Rep. 4 Ch. 764.
(7) 4 Ch. D. 49.
(8) Ibid. 123.
(9) 2 B. & C. 65.
(10) 8 Ves. 46.

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This is an appeal from a decision of Mr. Justice *Fry*, and the singularity of the appeal is this, that it is an appeal in favour of Mr. Justice *Fry's* opinion and against his decision; the explanation of that being, that the learned Judge conceived himself bound by some decisions of the Appeal Court to decide against his own opinion; and I am far from saying that I dissent from him on either point—either on principle, as to how he thought the case ought to be decided, or on the question whether a Judge in his position as a Judge of first instance could very well have decided otherwise.

The question we have to consider depends on very few facts. I will first state all those which I think material, and on which it appears to me my judgment ought to be based. A Mr. *Hallett*, a solicitor, was a trustee of some bonds. Without authority and improperly he sold them, and on the 14th of November, 1877, by his direction the proceeds of these bonds were paid to his credit at Messrs. *Twinings' Bank*, and there mixed with moneys belonging to himself, to the credit of the same banking account, and he also drew out by ordinary cheque moneys from the banking account, which he used for his own purposes. He died in February, 1878, and at his death the account stood in this way: that there was more money to the credit of the account than the sum of trust money paid into it; but if you applied every payment made after November, 1877, to the first items on the credit side in order of date, a large portion of the trust money would have been paid out. The question really is, whether or not, under these circumstances, the beneficiaries—that is, the persons entitled to the trust moneys, who are the present Appellants—are or are not entitled to say that the moneys subsequently drawn out—that is, drawn out by Mr. *Hallett* subsequently to November, 1877—and applied for his own use, are to be treated as appropriated to the repayment of his own moneys, or whether the Respondents, the executors, are right in their contention that they are to be treated as appropriated in the way I have mentioned, so as to diminish the amount now applicable to the repayment of the trust funds.

I will first of all consider the case on principle, and then I will

consider how far we are bound by authority to come to a decision opposed to principle. It may well be, and sometimes does so happen, that we are bound to come to a decision opposed to principle. Now, first upon principle, nothing can be better settled either in our own law, or, I suppose, the law of all civilised countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. A man who has a right of entry cannot say he committed a trespass in entering. A man who sells the goods of another as agent for the owner cannot prevent the owner adopting the sale, and deny that he acted as agent for the owner. It runs throughout our law, and we are familiar with numerous instances in the law of real property. A man who grants a lease believing he has sufficient estate to grant it, although it turns out that he has not, but has a power which enables him to grant it, is not allowed to say he did not grant it under the power. Wherever it can be done rightfully, he is not allowed to say, against the person entitled to the property or the right, that he has done it wrongfully. That is the universal law.

When we come to apply that principle to the case of a trustee who has blended trust moneys with his own, it seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he had a right to take away his own money. The simplest case put is the mingling of trust moneys in a bag with money of the trustee's own. Suppose he has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they are commingled in such a way that they cannot be distinguished, and the next day he draws out for his own purposes £100, is it tolerable for anybody to allege that what he drew out was the first £100, the trust money, and that he misappropriated it, and left his own £100 in the bag? It is obvious he must have taken away that which he had a right to take away, his own £100. What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in other money of his own, and draws out some money for his own purposes? Could he say that he had actually drawn out anything but his own money? His money was there, and he had a right to draw it out, and why should the natural act of simply drawing

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out the money be attributed to anything except to his ownership of money which was at his bankers.

It is said, no doubt, that according to the modern theory of banking, the deposit banker is a debtor for the money. So he is, and not a trustee in the strict sense of the word. At the same time one must recollect that the position of a deposit banker is different from that of an ordinary debtor. Still he is for some purposes a debtor, and it is said if a debt of this kind is paid by a banker, although the total balance is the amount owing by the banker, yet considering the repayments and the sums paid in by the depositor, you attribute the first sum drawn out to the first sum paid in. That was a rule first established by Sir *William Grant* in *Clayton's Case* (1); a very convenient rule, and I have nothing to say against it unless there is evidence either of agreement to the contrary or of circumstances from which a contrary intention must be presumed, and then of course that which is a mere presumption of law gives way to those other considerations. Therefore, it does appear to me there is nothing in the world laid down by Sir *William Grant* in *Clayton's Case*, or in the numerous cases which follow it, which in the slightest degree affects the principle, which I consider to be clearly established.

Then I come to the great difficulty in the case, the difficulty which, as I shall shew from an extract or two from Mr. Justice *Fry's* judgment, weighed with him. What he says is this: "If the matter were unfettered by authority, it would appear to me clear that where a man has a balance to his credit consisting in part of funds which are his own, and which he may legally draw out and apply for his own purposes, and in part of trust funds which he cannot lawfully draw out and apply for his own purposes, his drawings for his own purposes ought to be attributed to his own funds and not to the trust funds. But it appears to me that I am not at liberty, in the existing state of the authorities, to act according to the inclination of my own mind;" and then he refers to *Pennell* v. *Deffell* (2), and one or two cases that have followed it. In a second judgment in the same case, Mr. Justice *Fry* says this: "I have already expressed the opinion I should have been inclined to act on if I had been at liberty, but I

(1) 1 Mer. 572. (2) 4 D. M. & G. 372.

am not at liberty." So it is plain that, as far as Mr. Justice *Fry* was concerned, he would have decided otherwise if he had not been fettered by authority.

Now, the only authority worth considering for this purpose is the case of *Pennell* v. *Deffell* (1) itself. I will, in a moment, say a word about the subsequent decisions. First of all *Pennell* v. *Deffell*, one must remember, is the decision of a Court of co-ordinate jurisdiction with this Court, namely, the Court of Appeal in Chancery, and was decided several years ago. But, on the other hand, we must remember that the law ascertained or laid down in the decision or judgment which guides a future Judge or another Judge in applying it, is simply the expression of principle which is to be ascertained from the judgment. No doubt a part of the decision in *Pennell* v. *Deffell* was exactly this case, and the Court applied the law, as correctly stated by Mr. Justice *Fry*, by applying *Clayton's Case* (2) even to such a case as this, and to that extent destroyed the claim of the *cestui que trust.* But that was not the whole case of *Pennell* v. *Deffell*. The main part of *Pennell* v. *Deffell* was giving effect to the right of *cestuis que trust* in the case of blended trust moneys, and upon the very principle which I have endeavoured to explain, and which, if I may say so, was so clearly explained by Mr. Justice *Fry* in his judgment. If, therefore, we are to ascertain the principle on which *Pennell* v. *Deffell* is decided, we must look at the whole of the judgment, and not at one part of it only. That being so, I have come to this conclusion, that the principle is rightly laid down, and it is rightly applied throughout the judgment except as to this portion, and that as to this portion of the case there has been a mistake, not in the principle, but in the application of the principle. Therefore, if I am to be guided by the principle as laid down, I think the principle must prevail without regard to a mere slip in its application.

But it will be said that this part of *Pennell* v. *Deffell* has been followed in subsequent cases. So it has. As regards subsequent cases in the inferior Courts we need not trouble ourselves with them. Judges of first instance would not have overruled the mistaken application of principle. As regards the Court of Appeal,

(1) 4 D. M. & G. 372. (2) 1 Mer. 572.

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it seems to have been followed certainly in one, if not in two cases, without question; but although there are cases in our law where erroneous decisions, not reconcilable even with the judgment on which the decision proceeded, have created a rule of conduct, and as to which, after the lapse of years, Judges have not felt themselves at liberty to review the decision even by the light of the judgment on which the first decision was pronounced, yet no such considerations apply to this case. No human being ever gave credit to a man on the theory that he would misappropriate trust money, and thereby increase his assets. No human being ever gave credit, even beyond that theory, that he should not only misappropriate trust moneys to increase his assets, but that he should pay the trust moneys so misappropriated to his own banking account with his own moneys, and draw out after that a larger sum than the first sums paid in for the trust moneys. It never could have been made a rule of conduct, or have affected the transactions of mankind, and therefore it does not come within the line of cases which, having established a rule of conduct, no Judge could interfere with. It appears to me we should not be deferring to authority but making a misuse of authority, which is to declare the law, if by reason of this, which appears to me a mere slip in the case of *Pennell* v. *Deffell* (1), and which, it must be recollected, was a very small portion of the contest in that case, we were to consider ourselves bound to decide against what is the settled principle. Therefore, in my opinion, the appeal must be allowed.

BAGGALLAY, L.J.:—

The circumstances under which this appeal is brought may be concisely stated as follows: on the morning of the 14th of November, 1877, there was a balance of £1796 5*s.* 2*d.* to the credit of Mr. *Hallett* on his banking account with Messrs. *Twining*, this balance was in no respect composed of trust moneys over which he had control, but had been entirely derived from his own resources. On that day he paid in to the credit of the account two sums, one of £770 10*s.* 5*d.* and the other of £1804 0*s.* 7*d.*, as to which I entirely concur in the opinion expressed by Mr. Justice *Fry*, that for the purposes of those proceedings they must be regarded as trust

(1) 4 D. M. & G. 372.

moneys. With reference to these two sums it is to be observed that, though both were paid in on the same day, the entry of the receipt of the £770 10*s.* 5*d.* preceded that of the £1804 0*s.* 7*d.* in the books of Messrs. *Twining* and also in Mr. *Hallett's* pass-book. The account was continued until the death of Mr. *Hallett* on the 2nd of February, 1878, during which period Mr. *Hallett* drew out and paid in further sums, all of which were in respect of his private affairs. The banking account did not contain on either side any entry in respect of trust moneys other than the two already mentioned as having been paid in on the 14th of November. The sums drawn out amounted in the aggregate to £2662 0*s.* 2*d.*, whilst those paid in amounted to £1320 19*s.* 1*d.* only, and the balance to the credit of the account on the day of Mr. *Hallett's* death was £3029 15*s.* 1*d.* It is further to be noted, and it is to my mind a material circumstance, that the balance to the credit of the account never fell below the aggregate of the two sums of trust moneys.

An action having been commenced for the administration of Mr. *Hallett's* estate, summonses were taken out by the trustees of his marriage settlement and by a lady named *Cotterill*, who were respectively interested in the two trust funds, the former claiming payment in full of the sum of £770 10*s.* 5*d.* out of the balance which at the time of Mr. *Hallett's* death was standing to the credit of his banking account, and the latter claiming payment, out of the same balance, of £1708 16*s.*, part of the before-mentioned sum of £1804 0*s.* 7*d.* The claim of the trustees was based upon this, that the drawings of Mr. *Hallett* ought to be appropriated to such portions of the balances from time to time standing to his credit as had arisen from his own moneys, as distinguished from those of which he was a trustee; if this claim is well founded an application of the same principle would have entitled Mrs. *Cotterill* to the full sum of £1804 0*s.* 7*d.*, and not to the portion of it only which she claimed; her claim, however, was based upon an application of the well-known rule in *Clayton's Case* (1) that the drawings out from a banking account should be appropriated in strict order of date to the payments in, a rule which, it was contended, had been extended to cases similar to that under consider-

(1) 1 Mer. 572.

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ation by the decisions of the Lords Justices in the case of *Pennell* v. *Deffell* (1), and in other cases which have followed it. If the rule was applicable to the present case, the aggregate amount of Mr. *Hallett's* drawings was sufficient, as will appear from the figures I have quoted, to exhaust not only the original balance of £1796 5*s.* 2*d.* which had arisen from Mr. *Hallett's* private moneys, but the whole of the sum of £770 10*s.* 5*d.* which consisted of trust moneys. Mr. Justice *Fry* considered himself bound by the decisions referred to and disallowed the claim of the trustees, but allowed that of Mrs. *Cotterill.* Thus of the two trust funds paid in on the same day the *cestui que trust* of the one would lose everything whilst the *cestui que trust* of the other one would lose to the extent only of a very small sum. Whilst, however, Mr. Justice *Fry* felt bound to follow these decisions, he distinctly intimated that, if he had been unfettered by authority, he would have been prepared to hold that, where a man has a balance to his credit at his banker's, consisting in part of funds which he may properly apply to his own purposes and in part of trust funds which he cannot lawfully so apply, his drawings for his own purposes ought to be attributed to his own funds and not to the trust funds. From this decision of Mr. Justice *Fry* the trustees of Mr. *Hallett's* settlement have appealed.

Now, inasmuch as my own views as to what ought to be done in respect of the claim of the trustees are, except so far as I may feel that they ought to be controlled by authority, entirely in accordance with those expressed by Mr. Justice *Fry*, I propose to examine somewhat in detail the case of *Pennell* v. *Deffell* with the view of ascertaining, first, what principles were enunciated by the Lords Justices in the course of their judgments in that case; secondly, how those principles were applied by them to the circumstances of that case; and, thirdly, having regard to the principles enunciated and to the decision arrived at, how far the case of *Pennell* v. *Deffell* is an authority binding upon us in our dealing with the case now under consideration.

Mr. *Green*, whose estate was in course of administration in *Pennell* v. *Deffell*, died on the 22nd of October, 1849; for some time previously to his death he had two banking accounts, one

(1) 4 D. M. & G. 372. 18 Jur 273

with the *Bank of England* and the other with the *London Joint Stock Bank;* at the time of his death there was a balance to his credit of £1988 11*s.* 8*d.* at the former, and of £2174 0*s.* 10*d.* at the latter. I shall have occasion later to examine these accounts more closely, as they varied considerably in the character of their details, but for the present it is sufficient to say that each of these accounts embraced moneys paid in and drawn out by *Green*, partly on account of the trust estates which he represented, and partly on his own private account. Inquiries as to the balances having been directed by the decree, the Master found that the whole of one balance and the greater part of the other belonged to the trust estates, but, upon exceptions to the Master's report, the Master of the Rolls held that the trust moneys could not be followed into either of the banking accounts, and directed that the whole of both balances should be treated as part of *Green's* general estate, and the substantial question involved in the appeal to the Lords Justices was whether the Master of the Rolls was right in holding that the trust moneys could not be followed into the banking accounts. Upon this question Lord Justice *Turner* in the course of his judgment expressed himself as follows (1): "It is, I apprehend, an undoubted principle of this Court that as between *cestui que trust* and trustee, and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust." And after illustrating this principle by a reference to the way in which the Court was in the habit of dealing with cases in which trust property had been invested in trade, the Lord Justice proceeded as follows: "But of course in those cases as in other cases the property which is the subject of the trust must in some manner be ascertained." He then refers to the judgment of the Master of the Rolls as having proceeded upon a supposed impossibility of ascertaining what portions of the balances belonged to the trusts, and what portions to *Green's* general estate, and answers, in the terms I am about to read, an inquiry suggested by himself,

(1) 4 D. M. & G. 388.

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whether there were not rules and principles for ascertaining what belonged to the trusts in such a case as that under consideration. "Suppose," said the Lord Justice, "a trustee pays into a bank moneys belonging to his trust to an account not marked or distinguished as a trust account and pays in no other moneys, could it for one moment be denied that the moneys standing to the account of the debt due from the bankers, arising from the moneys so paid in, would belong to the trust, and not to the private estate of the trustee? Then, suppose the trustee subsequently pays in moneys of his own not belonging to the trust to the same account, would the character of the moneys which he had before paid in—of the debt which had before accrued—be altered? Again, suppose the trustee, instead of subsequently paying moneys into the bank, draws out part of the trust moneys which he has before paid in, would the remainder of those moneys and of the debt contracted in respect of them lose their trust character? Then can the circumstance of the account consisting of a continued series of moneys paid in and drawn out alter the principle? It may, indeed, increase the difficulty of ascertaining what belongs to the trust, but I can see no possible ground on which it can affect the principle." And Lord Justice *Knight Bruce*, in the course of his judgment, after some previous suggestions leading up to that to which I am about to refer, put the case of a trustee placing in a particular repository, such as a chest, certain moneys held by him in trust, and also certain other moneys of his own, and of his so mixing and blending the two that the particular notes or coins of which each consisted could not be identified, and of his taking a sum of money from the repository after such mixing and blending and applying it to his own purposes, and in expressing his opinion as to the conclusion to be arrived at in such a case the Lord Justice used the following language (1): "I apprehend that, in Equity at least if not at Law also, what he so took would be solely or primarily ascribed to those contents of the repository, which were in every sense his own. He would in the absence of any evidence that he intended a wrong be deemed to have intended and done what was right, and if the act could not in that way be wholly justified, it would be deemed to have been just to the utmost amount possible,"

(1) 4 D. M. & G. 382.

The Lord Justice added, and no one will, I think, dissent from what he said, that the proposition which he had just stated was founded on principle and supported by authority. But is there any reason why, if the proposition is founded on principle, it should be limited to moneys placed in and taken out of a particular repository? Why should it not be applicable also to a case of moneys paid into and drawn out from a banking account kept in the sole name of the trustee? It is true that in *Sleech's Case* (1), which immediately preceded *Clayton's Case* (2), Sir *W. Grant* held that, as between the banker and the customer, the payment of a sum of money into a banking account created a debt, and was not a mere deposit, but, as between the customer who is a trustee and his *cestui que trust*, is there any reason why an honest intention should not, as far as possible, be attributed to him in the one case as well as in the other?

Let me illustrate my meaning. On a certain day I receive £10 of trust money in sovereigns, and place them in a drawer in my desk, the next day I receive £10 of my own moneys, also in sovereigns, and place them in the same drawer; on the third day I require £5 for my own private purposes, and I take out five sovereigns from the mixed fund in the drawer—an application of the principle embodied in the proposition of Lord Justice *Knight Bruce* would appropriate the five sovereigns taken out on the third day to the £10 of my own moneys placed in the drawer on the second day, and not to the £10 of trust money placed there on the first day. Again, I receive a cheque for £100 on a trust account, it will not be required for a few days, and it is too large a sum to be kept in my desk, I pay it into a bank, and on the following day receive £100 on my own private account, and not wanting it for a few days I pay it into the same account; I require £50 or £100 for my own purposes before the time arrives for requiring any money for trust purposes, and I accordingly draw against the mixed fund for the £50 or £100. Can any reason be assigned why in this latter case, as well as in the former, I should not, as between myself and my *cestui que trust*, have the honest intention attributed to me of drawing against my own private funds, and not against the trust fund, though it was the first paid in?

(1) 1 Mer. 539. (2) 1 Mer. 572.

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That Lord Justice *Knight Bruce* saw no distinction in principle between the two cases is, I think, clear from the next proposition, which he enunciated in the following terms: "When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the *cestui que trust*, it must be deemed specifically theirs as between the trustee, and his executors and the general creditors after his death, on the one hand, and the trust on the other;" and, after some observations not material to be now noted, the Lord Justice continued as follows: "This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee, or owing also to him money in every sense his own."

The language of this latter sentence is, perhaps, somewhat vague. The previous sentence had reference to a trustee paying in trust moneys to a banking account; did the Lord Justice, when speaking of the bank holding also for the trustee money in every sense his own, refer to, or intend to include, private moneys of the trustee paid in by him to the same account? This appears to me to be the reasonable construction of the language used, and for the following reason: in the various steps by which the Lord Justice had arrived at his previous proposition he had taken, first, the case of trust money placed in a particular repository, then the addition to such trust moneys of the trustee's own moneys; thirdly, the abstraction from the mixed fund of moneys applied to his own purposes; and in advancing his second proposition, he first takes the case of trust moneys paid into a banking account, and insists upon their being regarded as if placed in a particular repository; and then follows the passage the effect of which I am now considering. The inference appears to me to be irresistible that the Lord Justice intended to adopt exactly the same steps in connection with a banking account as he had previously suggested with reference to moneys placed in a particular repository. If

the proposition as a whole is so read, it has the effect of extending to blended funds in a banking account the like rule or principle of attributing, where possible and as far as possible, an honest intention to a trustee drawing out money for his private purposes, as the Lord Justice had previously enunciated with reference to blended funds in a particular repository.

The principles thus enunciated by the Lords Justices (for the Lord Justice *Turner* expressed his full concurrence in the views expressed by Lord Justice *Knight Bruce*), taken and considered by themselves, amount to this: first, that trust moneys may be followed into a banking account; and, secondly, that in dealing with an account composed in part of trust and in part of private funds, an honest intention should, if and as far as possible, be attributed to a trustee; apart from the application of a third principle, also enunciated by the Lords Justices, and which I will consider presently, they would have fully justified the order which Mr. Justice *Fry* expressed himself ready to make, had he not felt himself fettered by authority.

The third principle was enunciated by the Lords Justices in the following terms. Lord Justice *Knight Bruce* said: "It may be, however, and, as I think is true, that cheques drawn by the trustee in a general manner upon the bank would for every purpose be ascribed to and affect the account in the mode explained and laid down by Sir *W. Grant* in *Clayton's Case* (1). The principles there stated would, I conceive, be applicable, notwithstanding the different nature and character of the sums forming together the balance due from the bank to the trustee, whatever the purposes and objects of the cheques." And Lord Justice *Turner* enunciated the same principle in the following terms (2): "We must see, however, whether the law does not furnish the means of meeting even the difficulty arising from such a continued series of moneys paid in and drawn out. I think that it does. I take it to be now well settled that moneys drawn out on a banking account are to be applied to the earlier items on the opposite side of the account. By every payment which he makes, the banker discharges so much of the debt which he first contracted. If that debt arose from trust moneys paid in by the customer, so much of

(1) 1 Mer. 572. (2) 4 D. M. & G. 391.

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those trust moneys is paid off, and unless otherwise invested on account of the trust, falls into the customer's general estate and is lost to the trust, because it cannot be distinguished from the general estate of which it has become part. If, on the other hand, the earliest debt due from the bank arose from the customer's own moneys paid in by him, that debt is *pro tanto* discharged, and the trust moneys subsequently paid in remain unaffected. The same principle runs through the whole account. Each sum drawn out goes to discharge the earliest debt due from the banker which is remaining unpaid; and thus, when it is ascertained what moneys have been paid in belonging to the trust, it becomes clear to what portion of the balance which remains the trust estate is entitled."

In these clear and forcible terms the Lords Justices enunciated the proposition that, as a general principle, the rule in *Clayton's Case* (1) must be applied to the banking accounts of trustees for the purpose of determining the proportions in which the *cestuis que trust* and general creditors, or the several classes of their *cestuis que trust*, are entitled to the debt due from the bankers in closing the account. To the general principle so enunciated I readily accede. But was it more than the enunciation of a general principle; that is to say, a principle to be applied in the absence of special circumstances, but liable to be modified in its application by reason of the necessity or propriety of applying some other general principle of equal or paramount importance?

In *Clayton's Case* Sir *W. Grant* held that in dealing with an account between a banker and his customer, and in the absence of any evidence of contrary intention, the law would imply an appropriation in the order of their respective dates of the items drawn out to the items of debt constituted by the several payments of the customer; and he further held, that the respective liabilities of successive partnerships in the banking firm must be regulated by the results of taking the accounts in the manner he had previously indicated.

Now *Clayton's Case* was decided upon the principle that in the absence of any expressed intention to the contrary, or of special circumstances from which such an intention could be implied, the appropriation of drawings out to the payments in as adopted in

(1) 1 Mer. 572.

that case represented what must be presumed to have been the intention of the parties concerned; and so viewed the decision is quite consistent with the like presumption being rebutted or modified in another case in which the circumstances were such as to negative any intention to make such an appropriation of the drawings out to the payments in. That such presumption could be so rebutted was held in the cases of *Henniker* v. *Wigg* (1), decided by the Court of Queen's Bench before the decision in *Pennell* v. *Deffell* (2), and more recently in the case of the *City Discount Co.* v. *McLean* (3), in the Exchequer Chamber, in which latter case, however, no reference appears to have been made to *Pennell* v. *Deffell.* In *Clayton's Case* (4) there were no circumstances from which it could be inferred that, either as between the bankers and their customers, or as between the successive partnerships in the banking firm, the parties had any intention other than that presumably to be attributed to them of appropriating, in order of date, the drawings out to the payments in; but the adjustment of the liabilities of the several partnerships which was effected in that case by the application of the general principle enunciated by Sir *W. Grant,* might have been materially modified had there been any special contracts between the parties or any equities affecting them.

And so, also, in my opinion, the general principle enunciated by the Lords Justices in *Pennell* v. *Deffell* was based, or ought to be regarded as having been based, upon the like presumption as that acted upon by Sir *W. Grant* in *Clayton's Case;* and that such presumption was liable to be rebutted, or its effects modified, by any equities affecting Mr. *Greenwood,* and those claiming through him, unless there was sufficient reason to the contrary. The questions then arise, did any such equities exist in *Pennell* v. *Deffell?* and if so, was there any sufficient reason for not giving effect to them?

That an equity might have existed sufficient to very materially modify the application of the general rule that the drawings out should be appropriated in order of date to the payments in, I cannot doubt; that equity was the obligation so forcibly insisted

(1) 4 Q. B. 492.
(2) 4 D. M. & G. 372.
(3) Law Rep. 9 C. P. 692, 701.
(4) 1 Mer. 572.

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upon by Lord Justice *Knight Bruce*, of attributing to the trustee, when the circumstances would admit of it, an intention to act honestly. It is, however, equally clear that the Lords Justices did not modify the application of the general rule by reason of the existence of this equity: and upon this circumstance the Respondents have laid much stress, and in support of their contention they have relied upon the following passage in the judgment of Vice-Chancellor *Wood* in the case of *Merriman* v. *Ward* (1), in which, referring to *Pennell* v. *Deffell* (2), that learned Judge said: "The Lords Justices had to consider whether the doctrine of appropriation could be overruled by another principle, namely, that the assignee must be presumed, so far as possible, to have drawn against his own fund, because the opposite presumption would be a presumption of fraud. Nevertheless the Court held that the ordinary rule must apply of appropriating the earlier payments to the earlier debts."

If the Lords Justices had the question alluded to by the Vice-Chancellor present to their minds when they delivered their judgments in *Pennell* v. *Deffell*, and deliberately solved it in the manner mentioned by him, it is much to be regretted that they did not make some specific reference to it; but I can find no reason, assigned in the judgment of either Lord Justice, why the rule, which had been so elaborately laid down, of attributing honest motives to a trustee was treated as having no application when the order to be made upon the facts of the case came under consideration; the absence of any such assigned reason leads me to the conclusion that either the suggested question was neither solved nor discussed as one in controversy, or that some special circumstances existed which are not noticed in the report.

And the comparative unimportance to the parties concerned of having this question decided or discussed may perhaps explain the omission. I have already referred to the fact that *Green* had two banking accounts, upon each of which there was a considerable balance in his favour when it was closed. As regards the account with the *London Joint Stock Bank*, the two first items to his credit consisted entirely of his own moneys and amounted together to upwards of £800, whilst the aggregate of all the moneys drawn

(1) 1 J. & H. 371. (2) 4 D. M. & G. 372.

out by him, whether on trust account or on private account, fell short of £800, so that it was wholly immaterial as regarded the result whether the account was taken upon the principle of appropriating the sums drawn out to the earlier items paid in, or to that portion of the balance which was composed of his own private moneys; whichever principle was adopted the result would have been the same, viz., that the *cestui que trust* would recover the full amount of all the trust moneys paid in.

But as regards the account with the *Bank of England* the facts were somewhat different; that account had commenced with a balance entirely composed of trust moneys, from which, on the 4th of October, 1849, *Green* had drawn out for his private purposes several sums amounting together to £107. Had the account been then closed there would have been no blending of trust moneys with private funds; the sums drawn out would have been simply a misapplication of trust moneys to the extent of £107. On the following day, however, *Green* paid in to the credit of the account a sum of £72 16*s.* 3*d.* of his private moneys, and another sum of £442 12*s.* of trust moneys, and on the same day drew out £18 18*s.* for his private purposes and £49 17*s.* 10*d.* for trust purposes. The sum of £72 16*s.* 3*d.* was the only sum paid in by *Green* to the credit of this account in respect of his private moneys, but subsequently to the 5th of October he drew out and applied for his private purposes various sums which, being added to the £18 18*s.*, exceeded by a small sum the amount of £72 16*s.* 3*d.* paid in by him on the 5th.

By the decision of the Lords Justices, the drawings of *Green*, as well before as on and after the 5th of October, were appropriated to the part extinguishment of the original balance consisting entirely of trust moneys, and the general creditors were allowed out of the ultimate balance the full amount of the £72 16*s.* 3*d.* paid in by *Green* on the 5th of October. With this result, therefore, the rule in *Clayton's Case* (1) was acted upon in dealing with the balance at the *Bank of England*. Had it been argued on the part of the Appellants that the payment of the £72 16*s.* 3*d.* by *Green* on the 5th of October ought to be treated as a repayment *pro tanto* of the £107 improperly drawn out by him

(1) 1 Mer. 572.

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on the 4th, before any blended account existed, the contention could hardly have been deemed unreasonable; no such contention however, appears to have been raised.

But the difference between the result of the system of appropriation adopted by the Lords Justices and what would have been the result if, on both accounts, the moneys drawn out by *Green* had been set off against the moneys paid in from his private resources, is very trifling. Had the latter system been adopted, the Appellants would have been entitled to £4077 5*s.* 4*d.*, whilst under the order of the Lords Justices they took £4011 13*s.* 5*d.*, a difference of £65 only. They had succeeded in reversing the decision of the Master of the Rolls who had deprived them of everything, and, as before observed, the substantial question argued was not, whether the Respondents were entitled to the £72 16*s.* 3*d.*, but whether the Appellants were entitled to anything. It is not an improbable view of the case that at the close of a judgment which had given them within a fraction all that they had claimed, the Appellants should have abstained from questioning a portion of that judgment with the view of obtaining an allowance of the additional fraction. And this view of the case appears to be borne out by the fact that, although judgment was reserved, it was eventually given without hearing a reply from the Appellants, which would hardly have been the case if the Appellants had objected to the allowance of the £72 16*s.* 3*d.* to the Respondent; and it may fairly be inferred, as well from the opening words of Lord Justice *Knight Bruce*, who offered to the counsel for the Appellants a right of reply after judgment, if they thought fit to claim it, as from the concluding words of Lord Justice *Turner*, that a claim on behalf of the Appellants for something more than was given them was at least arguable. Lord Justice *Turner's* observation was, that he had no doubt Lord *Eldon* would have gone at least as far as the Lords Justices were then going, and that his only doubt was, whether he would not have gone further. Upon what was the doubt based? Upon what could it have been based? The Lords Justices could only have gone further than they did go by depriving the Respondents of the £72 16*s.* 3*d.*, and giving it to the Appellants.

But, dealing with the decision of the Lords Justices in *Pennell*

v. *Deffell* (1), as I find it reported, I cannot regard it as satisfactory, if it is to be considered as establishing as a general proposition that in all such cases as that then under their consideration the presumption of an honest intention on the part of the trustee is to be altogether disregarded, however favourable to such a presumption the circumstances of any particular case may be, and that the rule of appropriating in strict order of date the drawings out to the payments in is alone to be applied. On the contrary, I entertain a very decided opinion that in cases like *Pennell* v. *Deffell*, or in such as that which is the subject of the present appeal, full effect should be given to the principle of attributing the honest intention whenever the circumstances of the case admit of such a presumption. It may, of course, happen that, through the acts of a trustee, whether wilfully dishonest or not, the ultimate balance may not be sufficient to meet the full amounts of all the trust moneys which may have been paid into a blended banking account, and the question then raised may be as to the various claims in respect of distinct trusts; in such a case the strict application of the general rule of appropriating in order of date the drawings out to the payments in may, and probably would, be correct. But in a case of another class, in which, as in that under consideration, the trustee has paid in trust moneys to the credit of his private account, and in his subsequent dealings with that account for his private purposes has never reduced his balance below the amount of the trust moneys so paid in, it is, to my mind, difficult to attribute to the trustee any other intention than that of appropriating his drawings to his own private moneys, so as to leave the trust moneys intact. If it is ever proper to follow trust moneys into a banking account in the interests of the *cestuis que trust*, I am unable to suggest a case more proper than that which we are now considering for the application of the principle that an honest intention should be attributed to the trustee. Now, if it can properly be considered that the decision in *Pennell* v. *Deffell* proceeded upon the special circumstances of that case, it is, of course, not an authority by which this Court is bound in dealing with the present appeal; but, however strong may be the impression upon my own mind, and it is very strong, that all the

(1) 4 D. M. & G. 372.

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circumstances of that case necessary for rightly appreciating it are not to be found in the report, I cannot ignore the fact that for nearly thirty years it has been recognised as an authority in no way depending on special circumstances, but as establishing a general principle applicable to all cases of a similar character. In the case of *Brown* v. *Adams* (1), to which our attention has been directed in argument, Lord Justice *Giffard* not only held himself bound by the authority of *Pennell* v. *Deffell* (2), but stated that he should have arrived at the same conclusion in the case before him even if not bound by that authority. With reference, however, to the case of *Brown* v. *Adams*, it is to be observed that Lord Justice (then Vice-Chancellor) *James*, from whose decision the appeal was brought, had arrived at a different conclusion. The question, then, remains whether *Pennell* v. *Deffell* is an authority so binding upon this Court that, however decided may be the collective or individual opinions of its members as to what, in the absence of authority, should be done in the matter of this appeal, we are bound to disregard them, and to shape our decision in accordance with what was decided in that case. My answer to that question must be in the negative. I fully recognise and appreciate the evils which in many cases would arise if the Judges of the Court of Appeal, or, indeed, if any other Court or Judge, were to act upon their individual views, regardless of what is generally understood by the expression "authority." Repeated decisions have established rules for determining the construction of particular words when used in wills, and other wills have been prepared and executed upon the faith of such words receiving the like construction. Titles have been acquired and lands dealt with upon the footing of the law being as enunciated in the judgments pronounced in other cases. And so, again, in matters of commercial business, contracts have been entered into upon the faith of certain rules, originating in the decisions of the Courts, being recognised as conclusive. Now, in such cases as these, and in others which will readily suggest themselves, the greatest injustice might be occasioned by a Court or a Judge treating such decisions as having been erroneously arrived at, and thereby creating doubt and uncertainty as to a rule of law which had previously been

(1) Law Rep. 4 Ch. 764. (2) 4 D. M. & G. 372.

treated as well and clearly defined. But no such injustice could arise in consequence of our dissenting from the decision in *Pennell* v. *Deffell* (1), and giving effect to such dissent. It can hardly be suggested that since that decision any trustee has kept and dealt with a blended banking account upon the faith that, as between his general creditors and his *cestuis que trust*, the rule adopted in that case would also be adopted after his death in dealing with his ultimate balance. If a trustee had acted upon any such view, he could hardly be considered as having had an honest intention. If, however, the actual decision in *Pennell* v. *Deffell* had been a logical consequence of an application of the principles enunciated by the Lords Justices, I should certainly have felt myself bound to follow it; but, having to decide between the general principles enunciated in that well-known case in which, as understood by me, I entirely concur, and the decision arrived at in the same case, and apparently upon an intended application of the same principles, but which would give to those principles a construction and an effect in which I cannot concur, I feel myself bound to adopt and give effect to the general principles, and to treat myself as unfettered by the actual decision. For these reasons I agree with the Master of the Rolls in thinking that the appeal should be allowed.

THESIGER, L.J.:—

I feel myself bound by authority to affirm the judgment of Mr. Justice *Fry*. Upon principle there is great strength in the argument for the Appellants. If specific coins, the proceeds of trust property, are deposited by a trustee in a box, either in his own custody or in that of another person, and in that box are mixed confusedly with coins, in every sense the property of the trustee, and being so mixed are subjected to dealings analogous to the drawings out and payings in of moneys standing in a banker's account, the trust is impressed upon the coins remaining in the box to the full amount of the proceeds of the trust property, if it be that at no time the mixed fund has been reduced below that amount, or if the mixed fund has at any time been reduced below that amount, then to any lesser amount below which it can be shewn that the mixed fund has never been reduced. So much is

(1) 4 D. M. & G. 372; 18 Jur. 273

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admitted by Lord Justice *Knight Bruce* in *Pennell* v. *Deffell* (1). But in that case, and in other cases, it has been held that the proceeds of that trust property may be traced, followed, and claimed by the trust creditor when, instead of their being placed in a box or other special repository, they are paid to a banker to be placed by him to the credit of the trustee's private account, and are so placed subject to the qualification at least that upon an appropriation of payment in accordance with the rule laid down in *Clayton's Case*, (2) it appears that the money claimed has not been drawn out. It has been argued that the qualification cannot be supported, and that when once it is admitted that money may be followed into a banker's account equally with money placed in a special repository, the money so followed must be subject to the same conditions and be recoverable under the same circumstances in the one case as in the other. True it is that in the case of money paid into the banker's account it is converted into a debt, while in the case of money placed in a special repository it remains in specie; but it may be said with reason that this distinction would rather afford a ground for not following the money into the banker's account at all, than a ground, when it is held that it may be followed, for not carrying out to their logical consequences considerations drawn from the analogy of the money placed in the special repository; and it is no doubt difficult to see why the rule as to appropriation of payments, which is a rule which embodies a presumption of fact rather than of law, and is founded upon the notion that in the absence of any expression of intention an appropriation of drawings out and payings in of moneys upon a banker's account in order of date would in most cases meet the intentions of the parties, should not bend before the fact that in the particular case such an appropriation would involve a breach of trust, if not a distinct fraud. That the rule is what I have stated it to be is shewn by the cases of *Henniker* v. *Wigg* (3) and the *City Discount Company* v. *McLean* (4), and those cases are good illustrations of the character of circumstances which would be sufficient to prevent the application of the rule. A bond in one case, a guarantee in the other, given by third parties, and covering a portion of the

(1) 4 D. M. & G. 381.
(2) 1 Mer. 572.
(3) 4 Q. B. 492.
(4) Law Rep. 9 C. P. 692.

customer's account with his bankers, was held to rebut the presumption that the balance covered by the security had been paid.

In each of these cases the presumption, if it had been acted upon, would have put an end to a civil remedy which from the facts of the case it was manifest was intended by all parties to be kept active. In the present case, and in cases of a similar kind, if the presumption is acted upon it would not only result in trust property, the proceeds of which are traced to the banking account, being lost to its proper owners, but would entail the further consequence of the customer being presumed to have committed a fraud, and this by an arbitrary rule not founded upon any equitable considerations (for general creditors have no equity as against the equity of a *cestui que trust* to trace and follow into a banking account the moneys arising from the sale of the trust property: *Frith* v. *Cartland* (1)), but established for the purpose of dealing with general accounts in the absence of special indications by the parties of their intentions.

The presumption of a man's innocence of crime may reasonably be set off against the presumption that he intended such an appropriation of payments upon his banking account as could only exist if he intended to commit a crime; and to the argument adduced by Mr. *Hallett's* representatives in the present case that the facts proved indicate that he did in fact intend to misappropriate, and had misappropriated, the trust property, the answer might be given, as it might have been given to Mr. *Hallett* himself if he had been alive to use the argument, "*Allegans suam turpitudinem non est audiendus.*" Giving, however, full effect to this reasoning, which, be it observed, is reasoning that is not difficult for even an uncultivated mind to follow, it remains to be seen how eminent Judges have dealt with the matter.

Clayton's Case (2) is capable of being, and has been, distinguished from the present. It with other similar cases shews, according to Mr. Justice *Blackburn*, in *City Discount Company* v. *McLean* (3), "that when a partner dies, and there is a change of the partnership, and the transactions with the new and old firms are all mixed up together in one account, the law treats the whole

(1) 2 H. & M. 417. (2) 1 Mer. 608.
(3) Law Rep. 9 C. P. 701.

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as one entire account, and it applies the items of credit to those of debit according to date in favour of the estate of the deceased partner." The decision of Sir *W. Grant* so explained is quite consistent with the general rule clearly laid down in the Common Law cases, that accounts rendered are only evidence of the appropriation of payments to the earlier items, which may be rebutted by evidence to the contrary. The two cases already cited of *Henniker* v. *Wigg* (1) and *City Discount Company* v. *McLean* (2) affirmed, as already pointed out, that general rule, and although they contained special features which might distinguish them to some extent from the present case, their *ratio decidendi* was wide enough to apply to the case of a person following his trust property into a banking account, and claiming to have that account adjusted so as to preserve his rights. Still it must be borne in mind that in these Common Law cases the inference arising upon the facts was that banker, customer, and third party all actually intended that the payments in and out of the account should not be taken in order of date, while here, bankers and third party could have had no intention in the matter, for they were ignorant of the fact that the trust funds had got into the account, and the intention of the customer is only derived from a presumption of law contrary to the probable facts of the case. This being so, we have in the case of *Pennell* v. *Deffell* (3), and in a Court of co-ordinate jurisdiction with this Court, or rather in a Court, to the functions of which, among other functions, this Court has succeeded, a decision by which, not only the principles applicable to a case like the present, were considered and laid down, but in which the very point raised upon this appeal was discussed and decided. The steps which, as pointed out at the commencement of my judgment, seem to lead to the conclusion, as a matter of logical argument, in favour of the Appellant's contention, were the steps taken by Lord Justice *Knight Bruce* in *Pennell* v. *Deffell*, and which led him to an exactly opposite conclusion, arrived at also by his colleague, Lord Justice *Turner*. Their judgment was given in 1853. In 1860, Vice-Chancellor *Wood*, in the case of *Merriman* v. *Ward* (4), following, as he was no doubt bound to do, that judgment, epito-

(1) 4 Q. B. 492.
(2) Law Rep. 9 C. P. 692.
(3) 4 D. M. & G. 372.
(4) 1 J. & H. 377.

mised it in these terms: "The Lords Justices had to consider whether the doctrine of appropriation could be over-ruled by another principle, namely, that the assignee must be presumed, so far as possible, to have drawn against his own fund, because the opposite presumption would be a presumption of fraud. Nevertheless, the Court held that the ordinary rule must apply of appropriating the earlier payments to the earlier debts." The effect of *Pennell* v. *Deffell* (1) could not be put in terms more clear, or more distinctly negativing the argument as regards the presumption of fraud which I have used. In *Frith* v. *Cartland* (2) again, the same learned Vice-Chancellor, while distinguishing the case before him from that of *Pennell* v. *Deffell*, said of the latter that in it part of the trust fund had been paid into a bank, but it was not ear-marked, and was wiped out by subsequent drawings, and the whole ultimate balance could not be fixed with the trust any more than a second £1000 of stock which a trustee might happen to acquire after selling £1000 of trust stock and spending the proceeds. In the year 1869 the point arose before Lord Justice *Giffard* in *Brown* v. *Adams* (3) in the same simple form in which it has been discussed before us, for the only question the Lord Justice had to decide was whether in a banker's account the appropriation of payments according to the rule in *Clayton's Case* (4) was to take place, so as to wipe off an item of £5000, which was admittedly trust moneys, and the case came before the Lord Justice under circumstances favourable to the reconsideration of the decision upon the point in *Pennell* v. *Deffell*, for the present Lord Justice, then Vice-Chancellor *James*, had granted an interlocutory injunction in favour of the trust creditor. But Lord Justice *Giffard* dissolved the injunction, not merely saying that he considered himself bound by the authority of *Pennell* v. *Deffell*, but adding that, even without that authority, he should have had no doubt in the case before him. Again, in *Ex parte Cooke* (5), decided in 1876, Lord Justice *Bramwell*, one of the Judges who took part in the decision in 1874 of the case of the *City Discount Company* v. *McLean* (6), is reported to have said in refer-

(1) 4 D. M. & G. 372.
(2) 2 H. & M. 417.
(3) Law Rep. 4 Ch. 764.
(4) 1 Mer. 572.
(5) 4 Ch. D. 123.
(6) Law Rep. 9 C. P. 692.

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ence to the point under consideration (1), "If the whole of the money had remained in the hands of the bankers without being drawn out, I think it clear that the *cestui que trust* could have claimed it as trust money traced into their hands, and if on properly attributing the payments any part of it is found to remain there the same rule must apply to what so remains." In that case the matter was referred to the Registrar, and we are informed by Mr. *De Gex*, who was engaged as counsel in the case, that upon the Registrar appropriating the payments in accordance with those observations, and upon an appeal from the Registrar to this Court, the case of *Pennell* v. *Deffell* (2) was treated as binding authority, and the appeal was dismissed.

I have purposely refrained from citing, as authority in the same direction, the case of *Lord Chedworth* v. *Edwards* (3), before Lord *Eldon*, as Chancellor, in 1802, because there may possibly be a doubt as to what he meant when he spoke of it being too much to infer that money at the bankers was the same money unconverted which had been paid in two years before, and the point does not appear to have been particularly argued before him. Putting aside, however, that case, the matter, as regards authority, stands thus: For a period of twenty-one years the judgment in *Pennell* v. *Deffell* stood unchallenged, and was followed as laying down a correct rule, and even when at the end of that period the case of the *City Discount Company* v. *McLean* (4) was decided, it was decided without reference to *Pennell* v. *Deffell*. As regards this last observation, it may be pointed out that the Lords Justices decided *Pennell* v. *Deffell* without reference to the previous case of *Henniker* v. *Wigg* (5); and it may be said that they had proceeded upon a misapprehension of the principle of Common Law applicable to the appropriation of payments in a banking or any other account. This may possibly be so, and if it was so, I am inclined to think that the misapprehension was shared by Sir *William Grant*, in laying down the rule in *Clayton's Case* (6), and although his decision may be distinguished, as it has been distinguished in the Common Law cases already cited, I cannot but think that the terms in

(1) 4 Ch. D. 127.
(2) 4 D. M. & G. 372.
(3) 8 Ves. 46.
(4) Law Rep. 9 C. P. 692.
(5) 4 Q. B. 492.
(6) 1 Mer. 572.

which he laid down the rule were intended by him to go beyond the limits of the particular case before him, and were wide enough, as they were assumed by the Lords Justices *Knight Bruce* and *Turner* to be, to cover the later case of *Pennell* v. *Deffell* (1). The character of the banking account where, to use the words of Sir *William Grant* himself, "all the sums paid in form one blended fund, the parts of which have no longer any distinct existence," was the keynote of his decision, and would have been scarcely necessary to be dwelt upon so prominently if any equity of the retired or deceased partner had been sufficient in itself to call for an appropriation of payments at least not contrary to any rule of law.

In this state of the authorities, I cannot feel myself justified in acceding to the Appellants' contention, and thereby taking upon myself to overrule judgments by which I think that in this Court we ought to consider ourselves bound. I fully realize that in overruling those judgments no injustice or inconvenience would be worked such as would arise in cases where, upon the faith and footing of a particular rule of law having been correctly laid down, business affairs have been for some time conducted, the practice of conveyancers has been regulated, or titles to property of any kind have been acquired. But that consideration appears to me to be one proper to influence the mind of a superior tribunal asked to overrule the judgment of inferior tribunals, although of long standing and often followed, rather than to afford a ground for this or any other Court disregarding such judgments when given by and followed in tribunals of co-ordinate jurisdiction. In other words, it constitutes a reason for holding that a decision in a particular Court has not so passed into and become part of the common and recognised law of the land as to prevent any Court overruling it, rather than for holding that it is not a binding decision upon all Courts of co-ordinate jurisdiction. It is said, further, that the point for our decision formed so insignificant a part of the judgment of the Lords Justices in *Pennell* v. *Deffell*, and may, perhaps, have been, or even probably was, so little dwelt upon in the argument before them, especially as no reply was heard by them, that their decision upon it is entitled to less weight than might other-

(1) 4 D. M. & G. 372.

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wise have been given to it. The fact is manifest that the sum which was affected by the particular decision was a mere nothing compared with the amount of which the then Master of the Rolls' judgment had deprived the Appellants, upon the ground that the trust moneys could not be traced and followed into the banker's account at all, and which amount the Lords Justices held was recoverable by the trust creditor. Granting, however, this fact, it is still equally manifest that the Lords Justices did not overlook the minor point, or, indeed, treat it as a minor point. Their judgments contain on the face of them signs from which one cannot but collect that the point was carefully considered by them. It is lastly said that the principles they themselves laid down in their judgment so clearly demonstrate the erroneousness of their conclusion upon the particular point in question, that it is just one of those cases in which no Court ought to be bound by such a conclusion. But here, again, however desirable it may be, as suggested in argument, that a Judge should have the courage of his convictions, it is equally desirable that he should have respect for those of other Judges, and I should attribute to myself another quality than that of courage if I were to hold that a conclusion which appeared a rational one to no less eminent Judges than the late Lords Justices *Knight Bruce* and *Turner*, the present Lord *Hatherley*, and the late Lord Justice *Giffard*, and which did not appear open to review to the learned Judges before whom upon the second occasion the case of *Ex parte Cooke* (1) came to be discussed, was necessarily illogical and absurd. Equity has gone very far in aid of trust creditors when it holds that they may follow and obtain, in priority to general creditors, moneys paid to a banker, and therefore no longer existing in specie, as moneys numbered and ear-marked, but converted into a debt; and it may be that the distinguished Judges I have referred to may have thought that Equity had gone far enough, and that, in the absence of express appropriation, the general rule of appropriation of payments in and out of a banker's account should apply to that debt when forming part of a larger debt made up as to the rest of moneys, not trust moneys, paid into the bank. However this may be, and notwithstanding the hesitation which I naturally feel in differing upon

(1) 4 Ch. D. 123.

the question of the binding effect of the authorities from the other members of the Court, I must express my opinion that the law laid down in *Pennell* v. *Deffell* (1) is binding upon this Court, and that the appeal ought, therefore, to be dismissed.

Appeal allowed.

Solicitor for Plaintiff: *H. A. Dowse.*
Solicitors for Mrs. *Cotterill*: *Fladgate & Co.*
Solicitors for *Hallett's* Trustees: *Fairfoot & Webb.*
Solicitors for other parties: *Humphreys & Son; F. Howse.*

(1) 4 D. M. & G. 372. 18 Jur 273

M. R.
1879
Nov. 20.

CAMBERWELL AND SOUTH LONDON BUILDING SOCIETY *v.* HOLLOWAY.

[1878 C. 225.]

Vendor and Purchaser—Agreement for Sale of Lease—Underlease—Misdescription—Abstract—Outstanding Legal Estate.

Although according to the decided cases, a vendor who contracts for the sale of leasehold property described as held under a lease, cannot, if nothing further is said, make a good title unless it is held under an original lease, yet in a case where the particulars and conditions of sale of property so described contained enough to give notice to a purchaser that the property was held under a derivative lease:—

Held, that the purchaser could not on that account refuse to complete, or claim compensation on the ground of misdescription.

Where an abstract of title shews a good equitable title in the vendor, with power to get in the legal estate under the Trustee Acts or otherwise, it is unnecessary for the abstract to shew the devolution of the legal estate.

Madeley v. *Booth* (1) commented on.

THIS was an adjourned summons taken out by the Defendant to vary the Chief Clerk's certificate respecting the title of the Plaintiffs to certain leasehold premises, the subject of the action.

On the 29th of March, 1878, the property was put up for sale by public auction under certain printed particulars and conditions of sale.

The property was thus described in the particulars: "a leasehold residence, No. 6, *Sydney Place, Lansdowne Road*, held for an unexpired term of about twenty-five years at a low ground rent, at present in hand, of the estimated value of £30 per annum, held on lease with the adjoining house, No. 5, *Sydney Place*, for the term of seventy-two years from Midsummer, 1830, and of which twenty-five years were unexpired at Midsummer last, at the entire ground rent of £8. No. 5, *Sydney Place*, has been underleased or assigned at the apportioned rent of £4, leaving £4 per annum payable in respect of the lease now offered for sale."

By condition 2, the purchase was to be completed on the 1st of May, 1878.

(1) 2 De G. & Sm. 718.

The other conditions, so far as necessary to be stated, were as follows:—

Condition 3. "The vendors shall deliver to the purchaser an abstract of title, commencing with an indenture of lease bearing date the 7th of October, 1830, and made between" the parties mentioned, "under which the lot is held, and the vendors shall not be required to produce any anterior or other title thereto, and the production of the last receipt for ground-rent shall be deemed conclusive evidence of the performance of the covenants mentioned in such lease up to the time of the completion of the purchase. No evidence shall be given or required respecting the lessor's title. The lease will be produced at the time of sale, and may in the meantime be inspected at the office of Messrs. *Marsden & Son*, the vendors' solicitors, and the purchaser shall be deemed to have bought with full notice of every clause, matter, or thing in such lease contained."

Condition 7. "All recitals and statements of deeds, with facts or conclusions of law contained in any deed or other instrument of title, shall be conclusive evidence of the deeds, facts, and matters so recited or stated."

Condition 8. "The vendors are the *Camberwell and South London Building Society*, and are selling under a power of sale contained in a mortgage deed dated the 9th of November, 1875, and no requisition shall be made by the purchaser as to whether default has been made or other evidence required as to the power or right of the said society to sell, nor shall the mortgagor be required to be made a party to the assignment or underlease to the purchaser, and no objection shall be made that there is an outstanding term of three days vested in the mortgagor to the said society, nor shall the vendors be required to get in the same."

Condition 10. "If any error or mistake shall appear in the description or in the nature or quality of the vendors' interest therein, or in the particulars of this sale, or any other error shall appear in respect thereof, such error or mistake shall not vacate or annul the sale, but a compensation shall be given or taken as the case may require, which shall be ascertained on behalf of both parties," in manner therein mentioned.

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The Defendant was declared the purchaser of the said premises, and signed a memorandum indorsed on the particulars and conditions of sale, whereby he acknowledged that he had purchased the same at the sum of £230, subject to the conditions.

An abstract of title was delivered to the Defendant's solicitors.

The abstract commenced with the said indenture of the 7th of October, 1830, and made between *John Waite* and *Mary* his wife, of the first part, *William Sanigear*, *Thomas Brackett*, and *William Barr*, of the second part, *George Fox* of the third part, and *Sarah Pool*, widow, of the fourth part, whereby the two houses, Nos. 5 and 6, *Sydney Place*, were demised by *W. Sanigear*, *T. Brackett*, and *W. Burr*, and by *John Waite* and *Mary* his wife (*G. Fox* joining to confirm the same), to *Sarah Pool*, for seventy-two years from Midsummer, 1830, at a yearly rent of £8 payable to the lessors, their executors, administrators, and assigns. The lease contained, among other covenants, a covenant by the lessee to permit the lessors, their executors, administrators, and assigns, "and the superior landlords of the said premises," to enter to view the condition thereof on notice; also a covenant by the lessors for the production of an indenture of lease dated the 30th of June, 1824, and made between the Dean and Chapter of *Canterbury* of the one part, and *James Blake* of the other part, and an indenture of assignment dated the 23rd of November, 1825, and made between the said *J. Blake* of the one part, and *Mary Bennett* (afterwards *Mary Waite*, one of the lessors) of the other part.

It further appeared that *Sarah Wilcocks* (formerly *Sarah Pool*) had intermarried with *Thomas Wilcocks*, and made her will dated the 5th of April, 1841, whereby, after reciting that she had power under her marriage settlement of appointing her leasehold estates, she, in exercise of that power, bequeathed No. 6, *Sydney Place*, unto *Fanny Standen*, for her own sole and separate use. And she appointed *John Hunter* and *W. Standen* her trustees and executors. It also appeared that by a codicil to her will, dated the 29th of May, 1844, the testatrix revoked the bequest to *Fanny Standen*, and bequeathed No. 6, *Sydney Place*, unto *W. Standen* and *Eleanor* his wife for their joint lives and for the life of the survivor of them, and after the death of the survivor to *Fanny Standen* for her own sole and separate use and benefit.

It also appeared that the testatrix died in December, 1845, and letters of administration with the will and codicil annexed were granted on the 4th of July, 1846, to *W. Standen* alone, *J. Hunter* having renounced.

The abstract next set out an assignment dated the 27th of July, 1855, and made between the said *W. Standen* and *Eleanor* his wife, and *Fanny Standen* of the one part, and *George Fox* of the other part, whereby, after reciting that the said lease and premises therein mentioned were vested in the said *W. Standen* and *Eleanor* his wife in possession, and in the said *Fanny Standen* in reversion, the said *W. Standen* and *Eleanor* his wife, and *Fanny Standen*, assigned the lease of No. 6, *Sydney Place*, to *G. Fox*.

The abstract further contained abstracts of an indenture of the 3rd of September, 1872, and made between *George Fox* of the one part, and *John Gray* of the other part, whereby the premises were assigned to *John Gray;* also of an indenture of the 9th of November, 1875, and made between *John Gray* of the one part, and *Richard Gates* and *Hannah Matilda* his wife of the other part, whereby the premises were assigned to *Richard Gates* and *Hannah Matilda* his wife for the remainder of the said term; also of an indenture of the 9th of November, 1875, made between *Richard Gates* and *Hannah Matilda* his wife of the one part, and the Plaintiffs of the other part, whereby the premises were demised by way of mortgage to the Plaintiffs, for the residue of the term less the last three days thereof, to secure the repayment of the sum of £125 and interest, by monthly payments as therein mentioned, with a covenant for sale on non-payment of the moneys thereby secured as therein mentioned.

The Defendant sent in requisitions to the title on the 14th of May, 1878, to which the Plaintiffs' solicitors sent answers. The Defendant subsequently refused to complete the purchase.

The Plaintiffs on the 21st of June, 1878, commenced their action against the Defendant and claimed to have the contract specifically performed.

The Defendant by his statement of defence alleged that no complete abstract had yet been delivered, and that upon the abstract the Plaintiffs could not make a good title. In particular

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he alleged that the property was held by an underlease and not by an original lease. He submitted that he was not bound specifically to perform the contract.

On the 1st of July, 1878, an order was made, on motion for judgment on the pleadings, directing an inquiry whether a good title could be made to the leasehold premises, having regard to the agreement, and, if so, when such good title was first shewn.

The conveyancing counsel to whom the matter was referred gave the following opinion on the 17th of January, 1879:—

"In my opinion a good title can be made to the beneficial interest in the leasehold property having regard to the agreement for sale, but with right to the purchaser to receive compensation for the error in representing the deed of the 7th of October, 1830, to be an original lease instead of an underlease, as it in fact was according to the 10th condition of sale, and that it was first shewn that such good title could be made on the 18th of April. 1878. The legal estate appears to be outstanding, as I do not see how it can have passed by the will of *Sarah Wilcocks*. The above remark as to the legal estate affects only the question of conveyance and was not intended to qualify my opinion that a good title had been shewn."

The Chief Clerk by his certificate dated the 5th of April, 1879, certified that a good title had been shewn.

The Defendant then took out a summons to vary the Chief Clerk's certificate, alleging various objections to the title, especially that the premises were held by an underlease and not by a lease; that no evidence had been adduced to shew that *Sarah Willcocks*, under whose will the Plaintiffs claimed, had power to make a will; that a proper abstract had not been delivered; and that even if a good title had been shewn the Defendant was entitled to compensation for the misrepresentation contained in the agreement.

Chitty, Q.C., and *W. W. Cooper*, for the Plaintiffs.

Davey, Q.C., and *Maidlow*, for the Defendant:—

The property is described in the particulars of sale as held under lease dated the 2nd of October, 1830. That is a misdescrip-

tion, for it turns out that it was only an underlease. A contract to sell a lease is not satisfied by the assignment of an underlease: *Madeley* v. *Booth* (1); *Hayford* v. *Criddle* (2); *Darlington* v. *Hamilton* (3); *Sugden's* Vendors and Purchasers (4); *Dart's* Vendors and Purchasers (5).

A material discrepancy between the particulars of sale of a lease and the lease has been held sufficient to entitle a purchaser to rescind: *Flight* v. *Booth* (6). This, we submit, is a misrepresentation; it is not a case for compensation, but one in which the purchaser cannot be compelled to accept the title.

Further, the legal estate is outstanding, and does not appear to have passed by the will of *Sarah Willcocks*.

[On the latter point *Avarne* v. *Brown* (7) and *Dart's* Vendors and Purchasers (8) were referred to.]

JESSEL, M.R.:—

The points raised in this case are some of them of more or less general interest, and some are particularly applicable to the case before me.

The first point I am going to decide is one which, if there were no authority, I should have thought ought to have been decided differently from the way in which it has been decided.

The word "lease" in law is a well-known legal term of well defined import. No lawyer has ever suggested that the title of the lessor makes any difference in the description of the instrument, whether the lease is granted by a freeholder or a copyholder with the license of the lord or by a man who himself is a leaseholder. It being well granted for a term of years it is called a lease. It is quite true that where the grantor of the lease holds for a term the second instrument is called either an underlease or a derivative lease, but it is still a lease, and consequently when a man sells a thing by its known and proper legal description, it does not appear to me that he can be charged with misrepresentation. If he says, "I sell you a house held under a lease for a term of

(1) 2 De G. & Sm. 718.
(2) 22 Beav. 477.
(3) Kay, 550.
(4) 14th Ed. p. 300.
(5) 4th Ed. pp. 109, 127, 984.
(6) 1 Bing. N. C. 370.
(7) 14 Sim. 303.
(8) Page 262.

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twenty-one years," every word of that is true, although the lessor may hold under a lease himself. As I understand the decisions, it has been decided that where a man sells a lease for a defined term of years, and nothing more is said on either side, he does not make a good title to the lease unless he shews that he holds direct from the freeholder, or, I suppose, the copyholder under license from the lord. I am not in a position to overrule those decisions. There are too many of them. Whatever the reasons may be, as I understand the matter, standing alone, and without anything being said beyond, you do not make a good title unless you shew what has been called an original lease, but when we come to something else beyond being said, there is no such decision.

In *Darlington* v. *Hamilton* (1) Vice-Chancellor *Wood* says this: "It has never been decided, and I do not mean now to touch that question, that if a person having a clear title as lessee for eighty years makes another lease for sixty years, and then the underlessee sells by auction the underlease for sixty years simply, describing it as a lease, and subject to a condition of sale that the lessor's title is not to be inquired into, and the lessor's title is perfectly good, but is not a freehold but only a term of years, this alone would be a reason for resisting specific performance." It is plain that the Vice-Chancellor thought an underlease would not do.

A similar question came before the Court in *Madeley* v. *Booth* (2). This case has since been referred to in terms not of approbation, and I entirely dissent from it. In that case the property offered for sale was stated in the particulars to be for the residue of a term of ninety-nine years. The 9th condition provided "that any error or misstatement of the property, term of years, ground rent, or other description should not vitiate the sale." These were as large terms as could be used. The title proved to be only an underlease, being a derivative term three days short of the original term created by mortgage with power of sale. The Plaintiff thus got all he had contracted for without any liability to the mesne landlord, and with the advantage of not being liable to be sued on the covenants. The supposed disadvantage, as stated by the Vice-Chancellor, was this, "that if the undertenant were to tender the rent to the head landlord he would

(1) Kay, 550, 558. (2) 2 De G. & Sm. 718, 722.

not be bound to accept that tender. There is no privity of contract in fact or in law between the head landlord and the under-tenant." It appears to me it was a better thing which the purchaser got than what was described in the particulars. And yet that learned Judge, of whom I wish to speak with the greatest respect, refused specific performance, and dismissed the bill notwithstanding the offer of compensation made by the Plaintiff. I am utterly at a loss to know what were the grounds of his decision. Supposing there were anything to call for compensation, why should not the 9th condition have been applied? I can understand a Judge refusing specific performance in a case like *Evans* v. *Robins* (1), where a man put up freehold ground rents for sale, and it turned out that he merely had the right of user of a pleasure ground. If the vendor knew what he sold it was fraud on the purchaser, and if he did not know it was a mutual mistake. Then again, in *Madeley* v. *Booth* (2) we find no reasons given for the decision, and in my opinion a judgment without the reasons for that judgment is not worth anything as a guide.

That being so, we come back to this, that *per se* calling a thing a lease which is a lease is not a misdescription.

Then, I come to consider the particulars of sale before me to see whether the man did buy an original lease, and whether he was told that he bought such a lease or not, and when I come to examine the particulars I arrive at the conclusion that the particulars told him that he was buying an underlease, and not only that, but told him to go and look at a document to see if that itself is not an underlease, as it turns out to be. The lease with which the title begins is a lease of the 7th of October, 1830, granted by the trustees of a marriage settlement of two houses to one *Sarah Pool* for a term of seventy-two years. There is something in the covenant which certainly gives rise to the suspicion that there was a superior lease, and the superior landlords are spoken of, which shews that there was a superior landlord somewhere. It is not difficult to see who the superior landlord was, and the words "executors, administrators, and assigns" in the covenant for payment of rent would of themselves shew that there was a superior landlord. Besides that, the vendors, who are the *Camber-*

(1) 8 Jur. (N.S.) 846. (2) 2 De G. & Sm. 718, 722.

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well and South London Building Society, have got a mortgage of it for a term less three days, and that is what they are selling, and conditions which refer to the lease provide that the purchaser "shall be deemed to have bought with full notice of every clause, matter, or thing in such lease contained." The purchaser then cannot complain on finding out it is an underlease. He finds it out after the sale, because he does not choose to look at it before.

Now this case must be distinguished from another class of cases, which have been, I think, decided on sound principles, that where a vendor in his particulars of sale states that which is untrue as a fact, he cannot get the assistance of a Court of Equity for specific performance, because at the same time he said, "You may go and look at some other document, by which you might ascertain that what I said was untrue." The purchaser has a right to say, "I was entitled to rely on your representation, and if it is untrue you must take the consequence." But where the statement itself is not untrue, and at the utmost can be said to be ambiguous, because it is a lease although it is also an underlease, and then you are told, "You may look at the documents and must be bound by the contents," it appears to me that is quite a different matter, and consequently that this purchaser bought with full notice of the fact that there was a superior landlord and that this was an underlease.

But I have another ground on these particulars for depriving the purchaser of any advantage from this objection. The 8th condition says this: "The vendors are selling under a power of sale contained in the mortgage deed, dated the 9th of November, 1875. No objection whatever shall be made that there is an outstanding term of three days vested in the mortgagor."

Now, here is a distinct statement that what is sold is an underlease. Therefore the purchaser could not have relied on the word "lease" in the particulars to shew that what he was buying was an original lease, nor was there, in my opinion, any representation that what was sold was an original lease, but there was distinct information that it was not.

To my mind it entirely destroys the notion that seems to have been entertained by the conveyancing counsel that the purchaser was entitled to any compensation. If he had notice, as in my

opinion he had, that he was buying an underlease, there is no ground for compensation.

[His Lordship then dealt with some other objections to the title, and proceeded with the objection as to the legal estate being outstanding:—] The general rule is this, that a man makes a good title by shewing a good equitable title and power to get in the legal estate. You are not bound to trace the legal estate further than to shew that you can get at it.

[His Lordship then dealt with that part of the title, and came to the conclusion that even if it did not appear on the face of the abstract where the legal estate was, at any rate it could be got in under the *Trustee Act*, that the abstract was sufficiently perfect, and that the objection therefore failed.]

I cannot part with the case without saying a word about the title wholly independent of the argument before me, and which struck me the moment I looked at the abstract. There was a sale to a purchaser for money in 1855, twenty-four years ago, and possession consistent with that ever since. The title is perfectly good under the *Statute of Limitations*, and all these objections are as vain and as frivolous, if the man really wanted the property, as can well be imagined, and the only possible explanation to be given of it is that he is endeavouring by every possible means in his power to get off his bargain. There will be the usual decree for payment of the purchase-money, and costs.

Solicitors: *G. W. Marsden & Son; Stones, Morris, & Stone.*

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NURSE *v.* DURNFORD.

[1877 N. 108.]

Practice—Solicitor and Client—Joinder of Plaintiff without his Authority—Costs—Liability of Plaintiff's Solicitors—Right of Proof against Estate of Deceased co-Plaintiff.

Ante 310
17 CLD 210
19 CLD 55.

The name of a Plaintiff having been inserted on the record without his knowledge, consent, or authority, on motion by the Defendants to dismiss for want of prosecution, and on motion by the Plaintiff to have his name struck out from the record:—

Held, that the solicitors to the record who had purported to act for the said Plaintiff were liable to pay his costs of the motion as between solicitor and client, and also to pay the costs of the Defendants of the action and all the motions therein.

It appearing that the solicitors had inserted the Plaintiff's name through the fault of a deceased co-Plaintiff:—

Semble, they would have a right of proof for the costs they were ordered to pay against his estate.

The form of order in *Dundas* v. *Dutens* (1) not followed.

The practice at common law as laid down in *Reynolds* v. *Howell* (2) followed.

THE question in this case, which came before the Court on two motions, was as to the proper form of order to be made when the name of a Plaintiff had been inserted on the record without his knowledge, consent, or authority.

The action was commenced on the 1st of October, 1877, in the name of *James Nurse*, the surviving partner in a firm of solicitors at *King's Lynn*, and *James Walker* and *Ann Nurse*, the executors of the deceased partner, against the Defendants *H. M. Durnford* and *William Woodall*.

The writ was issued on the 1st of October, 1877, by Messrs. *G. L. P. Eyre & Co.*, who acted as the Plaintiffs' solicitors. The statement of claim was delivered on the 12th of January, 1878, and was subsequently amended. The statement of defence of the Defendant *William Woodall* was delivered on the 1st of April, 1878.

On the 1st of August, 1878, an affidavit of documents was filed

(1) 1 Ves. 196. (2) Law Rep. 8 Q. B. 398.

on behalf of the Plaintiff *James Nurse*, but no further step was taken by the Plaintiff in the action.

On the 6th of February, 1879, *James Nurse* died, having by his will appointed *Eliza Nurse* his executrix.

On the 25th of October, 1879, the Defendant *W. Woodall* served the Plaintiff *J. Walker* and the said *Eliza Nurse* with notice of motion that *Walker* might be ordered to proceed with the action, or that the action might be dismissed with costs.

This was the first intimation which *Walker* had received that his name was joined as co-Plaintiff.

On the 3rd of November, 1879, the said Plaintiff *J. Walker* served *Eliza Nurse*, and also the Defendants, with notice of motion that his name might be struck out of the record as a Plaintiff, on the ground that the same had been inserted therein without his knowledge, consent, or authority, and he filed an affidavit to that effect, stating that he had no knowledge of the action or of his having been joined as Plaintiff until he was served with the said notice on the 25th of October, 1879.

On the 14th of November the two motions came on, and they were ordered to stand over that Messrs. *G. L. P. Eyre & Co.* might be served, and the Plaintiff's notice of motion be amended by asking that the costs of the said *James Walker* occasioned by the insertion of his name as Plaintiff might be paid by Messrs. *Eyre & Co.*, the solicitors on the record for the Plaintiffs. The notice of motion was accordingly amended, and served on the said solicitors.

On the 17th of November, 1878, the Defendant *H. M. Durnford* also served on the same parties a notice of motion to dismiss for want of prosecution.

In an affidavit filed by one of the firm of the Plaintiffs' solicitors in opposition to the motion, it was stated that the present firm and their predecessors had acted as the *London* agents of the Plaintiff *James Nurse*, a solicitor at *King's Lynn*, and that in the ordinary course of business they acted, as regards the institution and framing of suits, upon the instructions of *James Nurse*, without inquiry but assuming that he had proper retainers; that in this action the firm had taken instructions according to the usual custom from *James Nurse*, to institute the same in the joint names of the three Plaintiffs, but, as *James Nurse* was a Plaintiff himself,

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the firm were instructed to use their own names as the Plaintiffs' solicitors, and not as agents for *James Nurse*, and they assumed that *James Nurse* had procured a retainer from his co-Plaintiff, *J. Walker*.

The Plaintiff *Ann Nurse* had died.

Brett, for the Defendant *Woodall*, and *Cozens-Hardy*, for the Defendant *Durnford*, in support of their respective motions :—

The Defendants are clearly entitled to an order to dismiss, and the principal question is as to the proper form of order to be made in consequence of the name of the Plaintiff *Walker* having been inserted on the record without his authority or knowledge. The practice appears to have been different in the old Court of Chancery from that which prevailed in the Common Law Courts.

In the Court of Chancery, when a suit had been instituted in the name of a plaintiff without his authority, the plaintiff was ordered in the first instance to pay the costs of the defendant, and the solicitor by whom the suit had been improperly commenced was ordered to repay the plaintiff. This was done in the case of *Dundas* v. *Dutens* (1). The same practice was followed in *Wade* v. *Stanley* (2); *Tabbernor* v. *Tabbernor* (3); *Allen* v. *Bone* (4); *Hood* v. *Phillips* (5); *Tarbuck* v. *Woodcock* (6); *Bligh* v. *Tredgett* (7); *Palmer* v. *Walesby* (8). It is also recognised as the practice in *Morgan* and *Davey* on Costs (9), and the form of order is given in *Seton* (10). According to the practice in the Common Law Courts, the solicitor, who had commenced an action in the plaintiff's name without his authority, was ordered in the first instance to pay the costs which had been so occasioned: *Archbold's* Practice (11); *Reynolds* v. *Howell* (12).

Millar, for the Plaintiff *J. Walker*, submitted that the practice of the Common Law Courts should be followed, and that the solicitors should be ordered to pay all the costs occasioned by

(1) 1 Ves. 196; 2 Cox, 235.
(2) 1 Jac. & W. 674.
(3) 2 Keen, 679.
(4) 4 Beav. 493.
(5) 6 Beav. 176.
(6) Ibid. 581.
(7) 5 De G. & Sm. 74.
(8) Law Rep. 3 Ch. 732.
(9) Pages 60, 61.
(10) 4th Ed. pp. 635.
(11) 13th Ed. pp. 92, 93.
(12) Law Rep. 8 Q. B. 398.

their having inserted *Walker's* name on the record without his authority, and that the Plaintiff ought not to be made liable to pay the costs in the first instance.

Bardswell, for *Eliza Nurse*, the legal personal representative of *James Nurse*, against whom the action had not been revived, stated that *James Nurse's* estate was being administered in another branch of the Court, and submitted that the action should be dismissed without costs: *Chowick* v. *Dimes* (1); *Hill* v. *Gaunt* (2); *Daniell's* Chancery Practice (3).

Bagshawe, Q.C., and *De Castro*, for Messrs. *G. L. P. Eyre & Co.*, submitted that, although it now appeared that *James Walker* had not authorized his name to be inserted as Plaintiff, it had been done by the fault of *James Nurse*, and that, if an order were made against them for the costs, they should at any rate have a right of proof for the same against his estate.

JESSEL, M.R.:—

It appears from the authorities which have been cited that in the old Court of Chancery when a plaintiff moved to have his name struck out on the ground that the suit had been instituted without his authority, the practice was to order the bill to be dismissed with costs to be paid by the plaintiff to be afterwards paid by the plaintiff's solicitor who had filed the bill in his name, but without his knowledge or authority. That appears to have been the order made by Lord *Thurlow* in *Dundas* v. *Dutens* (4), but in that case the judgment seems to have been partly based on the assumption that the plaintiff had allowed his name to remain on the record down to the hearing, whereas it appears that the plaintiff had previously moved to have his name struck out of the bill, though the motion was ordered to stand over till the cause came on. Again, in the cases of *Wade* v. *Stanley* (5) and *Hood* v. *Phillips* (6), the motion was made after the bill had been dismissed with costs. However, the general rule of practice in the Court of Chancery seems to have been fully recognised by Lord Justice

(1) 3 Beav. 290.
(2) 7 Jur. (N.S.) 42; 9 W. R. 68.
(3) 2nd Ed. p. 716.
(4) 1 Ves. 196.
(5) 1 Jac. & W. 674.
(6) 6 Beav. 176.

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Wood in *Palmer* v. *Walesby* (1), where his Lordship observed: "The very circumstance of a solicitor using the name of a person as plaintiff involves the person whose name is so used in liability to the defendants, since they are not bound to look to the authority of the solicitor."

The rule adopted by the Common Law Courts, as laid down in *Reynolds* v. *Howell* (2), appears to have been that when an attorney brought an action in the name of a plaintiff without his authority the plaintiff was entitled to an order to stay the proceedings without payment of costs. That seems to me to be the more sensible practice, and one more in accordance with the law relating to principal and agent, than to leave the plaintiff to his own remedy against the solicitor who has improperly joined him as plaintiff. I shall, therefore, adopt the Common Law rule, and as Messrs. *G. L. P. Eyre & Co.* have acted without sufficient authority in making Mr. *Walker* co-Plaintiff, they must pay the costs; but upon the facts stated in the affidavit of one of the firm, I consider that they would have a right of proof against the estate of the deceased Plaintiff, *J. Nurse*, for all the costs which they will have to pay.

There will be one order on all the motions staying all proceedings in the action, and for Messrs. *G. L. P. Eyre & Co.* to pay the costs of the motions as between solicitor and client of the Plaintiff *Walker* and the Defendants' costs of the action, including their costs of the motions and the costs of the former motions of the Defendant *Woodall* which had been reserved.

MINUTES OF ORDER:—That this action be dismissed, and that it be referred to the Master to tax the costs of the Plaintiff *James Walker* as between solicitor and client of these motions, and to tax the costs of the Defendants respectively of this action, including in the costs of the Defendants the costs of all motions made in this action; and that Messrs. *G. L. P. Eyre & Co.* pay to the Defendants *H. M. Durnford* and *William Woodall*, and to the Plaintiff *James Walker*, their said costs when so taxed.

Solicitors: *Tompson, Pickering, Styan, & Neilson*, agents for *Archer & Archer, King's Lynn; S. J. Debenham; R. Jones & Co.; Burton, Yeates, & Hart; G. L. P. Eyre & Co.*

(1) Law Rep. 3 Ch. 732, 735. (2) Law Rep. 8 Q. B. 398.

(2) See Washington v. the Gas Co. Ante 370-2

WEDDERBURN *v.* PICKERING.

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Dec. 5.

[1879 W. 127.]

Practice—Trial by Jury—Rules of Court, 1875, *Order* XXXVI., *rr.* 3, 26.

In an action relating to the ownership of land and to the obstruction of a right of way in the country, the Defendants having given notice under Rules of Court, 1875, Order XXXVI., rule 3, for the trial of issues of fact by jury, on motion by the Plaintiff that the action might be tried by a Judge without a jury:—

Held, that, as it appeared that the question in the action was mainly one of title depending on certain conveyances, plans, and photographs, it could be more conveniently tried without a jury under Order XXXVI., rule 26.

20 L.J. 369
2 Ch. D. 135

THIS action was brought by the Plaintiff, the owner of certain land and buildings at *Leeds*, against the Defendants, the *Athenæum Buildings and Offices Company, Leeds*, who were the owners and occupiers of property adjoining the Plaintiff's premises, claiming that the company might give up possession to the Plaintiff of the site of part of a wall pulled down by the company, which, as the Plaintiff alleged, stood upon his premises, and that the company might be restrained by injunction from obstructing a certain right of way claimed by the Plaintiff.

The pleadings had been delivered, and on the 30th of October, 1879, the Plaintiff gave notice of trial of the action before the Master of the Rolls.

On the 1st of November, 1879, the Defendants gave notice, under Rules of Court, 1875, Order XXXVI., rule 3, that they desired to have the issues of fact in the action tried before a Judge and jury.

The Plaintiff now moved, under Order XXXVI., rule 26, that notwithstanding the said notice given by the Defendants the issues of fact in the action might be tried by a Judge without a jury at the same time with the trial of the action.

There were three photographs produced to shew the state of the property in question, one of which was produced by the Defendants.

The Defendants' solicitor, by his affidavit, stated that the De-

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fendants were desirous that the action, or at all events the issues of fact in the action, should be tried by a Judge and jury. The reason, he alleged, was that it would in that case be possible to have the trial at *Leeds*, where the witnesses resided, and also to have a view of the premises to which the action related, which were situate within 100 yards of the Assize Courts at *Leeds*. He considered that without a view it would be impossible to explain or to make intelligible the questions in dispute. He added that if the action were tried at *Leeds* instead of in *London* the result would be a saving of expense to the parties, as it was intended to call about fifteen witnesses, several of them professional men, residing at or near *Leeds*.

One of the firm of the Plaintiff's solicitors said in his affidavit that, with regard to the obstruction of the right of way claimed by the Plaintiff, the roadway had been restored to such an extent that the view of it could not throw any light on the question of obstruction; that two of the photographs produced shewed the state of the roadway during the obstruction and its partial restoration; that with respect to the site of the wall claimed in the action the ownership was entirely a question of title, and depended upon the construction of certain deeds and the explanation afforded by plans and conveyances, and also by such explanation as was afforded by inspection of the photographs, that, in his opinion, no question raised in respect of the site could be elucidated by an actual survey of the premises and that the question was essentially one for a Judge and not for a jury. He further stated that the Plaintiff would not call above four or five witnesses.

Chitty, Q.C., and *Langworthy*, for the Plaintiff, in support of the motion:—

This action might, before the passing of the *Judicature Act*, have been tried at common law, or the Plaintiff might have come to the Court of Chancery for an injunction. Under the new practice, although the Defendants can, under Order XXXVI., rule 3, give notice that the issues of fact in the case should be tried at the assizes before a Judge and jury, yet under rule 26 of the same order the Judge has a discretion to order the trial to take place before the Judge alone without a jury, and we

submit that this is a proper case for that discretion to be exercised: *Swindell* v. *Birmingham Syndicate* (1); *Ruston* v. *Tobin* (2); *Powell* v. *Williams* (3).

Marten, Q.C., and *Ingle Joyce*, for the Defendant:—

The Defendants have a *primâ facie* right to have their case tried before a jury, and there is nothing which has been brought forward by the Plaintiff which can displace that right. In *Bordier* v. *Burrell* (4) your Lordship considered that the Defendant in that action was entitled to have his case tried before a jury, and we submit that this is a case which can be more conveniently tried in that manner and at less expense than if tried in *London*. Before the passing of the *Judicature Act* the Court of Chancery sometimes sent down issues to be tried before a jury. The present case is one which could be best tried at *Leeds*, as the property is there situated, and a jury, by inspection, might determine the question at once.

JESSEL, M.R.:—

I am very unwilling to interfere with the right given by the *Judicature Act* to a Defendant to have his action tried before a jury, and I do not forget that this common law right, if I may so call it, ought not to be taken away by mere caprice, but only when there is some reason why the case cannot be conveniently tried before a jury. This was laid down by Vice-Chancellor *Hall* in *Clarke* v. *Cookson* (5), where his Lordship observed, with reference to Order XXXVI., rule 26, "This rule was framed expressly to meet cases which would, under the old system, have been tried in the Chancery Division, and which might be considered, by reason of involving a mixture of law and fact, or from great complexity, or otherwise, not capable of being conveniently tried before a jury."

I must say I think that this action is one which cannot be conveniently tried before a jury. It is a conveyancing action. According to the affidavit of one of the Plaintiff's solicitors, the

(1) 3 Ch. D. 127.
(2) 10 Ch. D. 558.
(3) 12 Ch. D. 234.
(4) 5 Ch. D. 512.
(5) 2 Ch. D. 746.

M. R. 1879 WEDDERBURN v. PICKERING.

ownership of this site is entirely a question of title, and depends upon the construction of certain deeds and the explanation afforded by plans and conveyances, and also by such explanation as is afforded by certain photographs, and he considers that no question raised in respect of the site will be elucidated by an actual survey of the premises, and that the action is essentially one for a Judge and not for a jury. On the other hand, the Defendant alleges that the expense would be greater if it were tried in *London*, but that is not the question before me, though I think that, judging from experience, a trial in *London* would not be more expensive than a trial at *Leeds*. I believe the expense would be very much less. Then the Defendant says that if tried at *Leeds* the jury could have a view of the property. Now as to that there are three photographs produced, one of which is produced by the Defendant, which will tell the Judge all that he needs to know, and that photograph, with the plan and the deeds, furnish all the necessary evidence. This is just the kind of evidence which a Judge can give his attention to, and which it is very difficult for a jury to follow, and on which they could not decide without the direction of the Judge.

I am of opinion that this is peculiarly a case which it is not convenient for a jury to try, and just a case which a Judge can try well. I shall therefore exercise my discretion by making an order according to the Plaintiff's notice of motion: the costs to be costs in the action.

Solicitors for Plaintiff: *Paterson, Snow, & Bloxam*, agents for *Dibb, Atkinson, & Braithwaite, Leeds.*

Solicitors for Defendant: *Gregory, Rowcliffes, & Rawle*, agents for *G. E. Pickering, Leeds.*

In re BRANDON'S TRUSTS.

M. R.
1879
Dec. 20.

Lunacy—Person of Unsound Mind not so found—Guardianship and Maintenance—Form of Order.

On a petition by a person of unsound mind not so found for payment of a fund in Court and for the appointment of a guardian, the fund was ordered to be paid to the person proposed as guardian, he undertaking to apply it for the maintenance, comfort, and support of the Petitioner.

Vane v. *Vane* (1) corrected.

THIS was a petition under the *Trustee Relief Act* by a person of unsound mind, not so found by inquisition, for payment to her of a fund in Court to which she was entitled, and for the appointment of a guardian.

Davey, Q.C., and *Speed*, in support of the petition, referred to *Vane* v. *Vane* (1), where it appeared from the report that an order had been made for the appointment of a guardian of the person and estate of the Plaintiff, who was a person of unsound mind not so found, but the jurisdiction of a Judge in the Chancery Division to make such an order had been questioned by the Court of Appeal in the case of *In re Bligh* (2).

[JESSEL, M.R.:—I do not think I appointed a guardian in *Vane* v. *Vane*.]

Chitty, Q.C. (*amicus curiæ*), referred to the actual order made in *Vane* v. *Vane*, which somewhat differed from the report, and was in this form: "It appearing that *Sarah Jane Vane* is from her state of mind incompetent to manage her affairs, and that she has not been found lunatic by inquisition, it is ordered that a proper person be appointed to act in the nature of a guardian of her person and estate."

Mozley, for the Respondents.

JESSEL, M.R., made an order for payment of the fund to the person proposed as guardian, he undertaking to apply the whole of it for the maintenance, comfort, and support of the Petitioner.

Solicitors: *Dawes & Son.*

(1) 2 Ch. D. 124. (2) 12 Ch. D. 364.

M. R.
1880
Jan. 31.

OSBORNE TO ROWLETT.

[1879 O. 51.]

Vendor and Purchaser—Will—Trust for Sale—Devise to Trustees, "their Heirs, Executors, and Administrators"—Omitting "Assigns"—Devise of Trust Estates—Sale by Devisees of Surviving Trustee—Doubtful Title—Summons under Vendor and Purchaser Act, 1874—*Costs.*

Where real estate is devised to trustees and "their heirs" (omitting "assigns") in trust for sale, the trust must be considered as annexed, not to the person, but to the fee simple estate taken by the trustees, so that the trust can be executed by the devisees of trust estates of the surviving trustee.

A testator by his will, dated in 1845, devised and bequeathed his real and personal estate to his wife for life, subject to the payment of his debts, and from and after her decease to *A.* and *B.*, "their heirs, executors, and administrators, upon trust to sell and dispose thereof at such times and in such manner as they my said trustees shall deem expedient."

A. and *B.* both predeceased the tenant for life, *B.*, the surviving trustee, having devised his trust estates. Upon the death of the tenant for life, *B.*'s devisees contracted to sell part of the real estate of the original testator:—

Held, upon a summons under the *Vendor and Purchaser Act*, 1874, that *B.*'s devisees could make a good title, and one which the Court would force upon a purchaser.

Cooke v. *Crawford* (1) held to be overruled.

Observations on the duty of the Court to decide doubtful questions of title as between vendor and purchaser.

The question of costs as between vendor and purchaser where the title is disputed considered.

ADJOURNED SUMMONS.

Robert Osborne, by his will, dated the 10th of April, 1845, devised and bequeathed all his real and personal estate unto and to the use of his wife during her life or widowhood, subject to the payment of his debts and funeral and testamentary expenses: and from and after her decease, "I give, devise, and bequeath all and every the same hereditaments and premises and personal estate, and every part thereof, unto my brother *Thomas Osborne*, and my friend *Richard Sutton*, their heirs, executors, and administrators, upon trust, as soon as conveniently may be after my said wife's decease, to sell and dispose thereof and every part thereof

(1) 13 Sim. 91.

at such times and in such manner as they my said trustees shall deem expedient," and to invest the proceeds upon "eligible security," and apply the income for the maintenance of all his children until the youngest should have attained twenty-one, and then to distribute the capital equally among such of his children as should be then living. And the testator appointed his wife and the said *T. Osborne* and *R. Sutton* his executors.

The will contained no power to appoint new trustees, nor any express power to give receipts.

The testator died on the 11th of April, 1845, and his will was proved by his widow and the said *T. Osborne*. He left several children.

Richard Sutton died on the 20th of January, 1860.

Thomas Osborne, the surviving trustee of the will, died on the 20th of January, 1865, having by his will, dated the 9th of September, 1858, devised all his trust and mortgage estates unto and to the use of *Joseph Johnson* and his nephew *Thomas Osborne*, their heirs and assigns.

The widow of the testator, *Robert Osborne*, died on the 17th of March, 1879, whereupon the said *Joseph Johnson* and *Thomas Osborne*, claiming to act in pursuance of the trust for sale contained in his will, entered into a contract for the sale of part of the real estate comprised in the will to a purchaser for £352.

The purchaser raised the objection that, inasmuch as the trust for sale in *Robert Osborne's* will was not limited to the "assigns" of the trustees therein named, the devisees of the surviving trustee could not make a title without the concurrence of the beneficiaries.

The vendors thereupon took out this summons under the *Vendor and Purchaser Act*, 1874, that it might be declared that they could make a good title to the purchaser.

It did not appear that the concurrence of the beneficiaries could not have been obtained.

Chitty, Q.C., and *Whately*, for the vendors:—

The purchaser will rely on *Cooke* v. *Crawford* (1), where it was held that the devisees of a surviving trustee could not exercise a

(1) 13 Sim. 91.

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trust for sale: but the question is whether that is now to be considered as a binding authority.

In the first place it is to be noticed that this is a *trust* for sale, and not a *power*, which might perhaps require to be more strictly construed.

The devise is to two persons "and their heirs upon trust to sell," and not, as in *Cooke* v. *Crawford* (1), "upon trust that they, or the survivor of them, or the heirs of such survivor, shall sell;" and the present case might be distinguished from *Cooke* v. *Crawford* on that ground, if necessary. But the true rule is, as Mr. *Hayes* points out (*Dart's* Vendors and Purchasers (2)), that where the legal estate is vested, as it is here, in two or more persons as trustees for sale, or for other purposes, the trust survives and devolves with the legal estate, notwithstanding any loose expressions of a different tendency. That is, we submit, the principle to be applied in order to ascertain who, upon the deaths of the original trustees, are the persons to execute the trust.

But *Cooke* v. *Crawford* was decided on a totally different principle, namely, that where the testator has declared that a trust for sale shall be exerciseable by the trustees named, and the survivor of them and the "heirs" of the survivor, he has named the heir of the survivor as the proper person to execute the trust on the death of the original trustees, and that a sale by the devisees of the surviving trustee is therefore unauthorized: that is to say, the testator is considered as having reposed a personal confidence in the heir.

That case has been questioned and commented on with disapproval in several subsequent cases.

In *Titley* v. *Wolstenholme* (3) Lord *Langdale* points out that it is impossible to assume that the testator could have intended to repose any personal confidence in an unascertainable person such as the heir of a survivor of several persons, and he expresses his opinion that a surviving trustee is not committing a breach of trust in devising the trust estate to proper persons. The observations in his judgment tend to shew that he disapproved of *Cooke* v. *Crawford*, though his actual decision turned on the word "assigns,

(1) 13 Sim. 91. (2) 5th Ed. p. 608, note (*m*).
(3) 7 Beav. 425.

which occurred in the case before him, but does not occur in *Cooke* v. *Crawford* (1). But the word "assigns" really expresses nothing more than would be understood without it: it possesses no legal force whatever: *Williams* on Real Property (2).

[JESSEL, M.R.:—"Assigns" is not a word of limitation: it only means to shew that the man takes an assignable estate.]

The decision in *Cooke* v. *Crawford* seems also to have been viewed unfavourably by Lord *Romilly* in *Macdonald* v. *Walker* (3); by Vice-Chancellor *Parker* in *Wilson* v. *Bennett* (4); by Vice-Chancellor *Wood* in *Hall* v. *May* (5); by Vice-Chancellor *Stuart* in *Ashton* v. *Wood* (6); and by the Court of Queen's Bench in *Stevens* v. *Austen* (7).

In *Ashton* v. *Wood* it seems clear that Vice-Chancellor *Stuart* would have decided that the devisee of a surviving trustee could execute the trust, had he not considered that the contrary was established by "a stream of authority" which he could not resist.

[JESSEL, M.R.:—There is no "stream of authority" as far as I can see.]

The point also arose in *In re Burtt's Estate* (8).

[JESSEL, M.R.:—That was a case of leaseholds, and therefore has not much bearing on this case.]

Ockleston v. *Heap* (9) and *Mortimer* v. *Ireland* (10) are also cases usually referred to on this subject: but the question there was a different one, namely, whether on the death of all the original trustees, the *cestuis que trust* were entitled to have new trustees appointed.

[JESSEL, M.R.:—That was their clear right when the trustees in whom personal confidence was placed were gone.]

It will be observed that in none of the cases has a sale by the devisee of the surviving trustee been held to be bad: they only go the length of saying that a title made in that way is so doubtful

(1) 13 Sim. 91.
(2) 8th Ed. p. 141.
(3) 14 Beav. 556.
(4) 5 De G. & Sm. 475.
(5) 3 K. & J. 585.
(6) 3 Sm. & Giff. 436.
(7) 3 E. & E. 685.
(8) 1 Drew. 319.
(9) 1 De G. & Sm. 640.
(10) 6 Hare, 196; 11 Jur. (O.S.) 721.

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that a purchaser will not be compelled to accept it. But the doctrine that the Court will not force a doubtful title upon a purchaser has now been got rid of by recent decisions; for it is the duty of the Court to remove the doubt by deciding the point: *Alexander* v. *Mills* (1); *Radford* v. *Willis* (2).

To decide in favour of the vendors in the present case may strengthen some titles but cannot weaken any: it would only follow that in some previous cases unnecessary precaution had been taken. A title can at all events be made in this case under the charge of debts: *Hodkinson* v. *Quinn* (3).

[JESSEL, M.R.:—I do not intend to decide the case on that ground alone, though it is material as shewing that the testator contemplated that a sale might be necessary in any case.]

We submit that the true principle which should govern this case is this, that the trust is not in the nature of a power confided to certain specified persons, but is annexed to the legal estate created by the will, and is intended to follow the devolution of such estate.

Davey, Q.C., and *W. W. Knox*, for the purchaser:—

The testator in devising to the trustees and "their heirs" intends to shew not merely the nature of the estate his trustees are to take, but the persons who are to execute the trust. The expression "my said trustees" means, with reference to the real estate, *Osborne* and *Sutton* and the survivor of them and the heirs of the survivor: and those are the persons by whom alone the testator has chosen to say the trusts of his will shall be executed; he has not chosen to name the "assigns" also. If the person who happens to be the heir of the surviving trustee cannot execute the trust by reason of infancy or otherwise, then the Court will execute it or appoint trustees to do so. The argument that the devise to the trustees and their heirs gives them the legal estate, and therefore an absolute power of disposition, goes too far, for that would include a power of assignment *inter vivos*.

[JESSEL, M.R.:—Such an assignment would be a breach of trust.]

(1) Law Rep. 6 Ch. 124. (2) Law Rep. 7 Ch. 7.
(3) 1 J. & H. 303.

Not necessarily, if "assigns" are named. We submit that the insertion or omission of the word "assigns" is an important element to be considered in cases of this kind, for the word is to be regarded in a double aspect, that is to say, not merely as indicating the nature of the estate the trustees are to take—which, we admit, would be given without it—but as indicating the parties who are to execute the trust. To say that the "assigns" of the trustees might execute the trust would be, in effect, to introduce an expression into the will which the testator has not used. Lord *Cottenham's* judgment in *Mortimer* v. *Ireland* (1) and Mr. Justice *Hill's* observations in *Stevens* v. *Austen* (2) are in favour of giving a special force to the word "assigns." *Cooke* v. *Crawford* (3) exactly governs this case, and it has never been overruled. It is treated as law by Lord *St. Leonards* (4), and having regard to the fact that it is a decision nearly forty years old, we submit that it must now be considered as a binding authority.

[JESSEL, M.R.:—When I first had the honour of sitting here, I used to think myself bound by any decision of a Vice-Chancellor that was twenty years old; but the Court of Appeal in one instance held that I was not so bound. I then reconsidered my position, and thought I was not bound by any decision of a Court of co-ordinate authority: accordingly I have since frequently declined to follow such authority. Here the only question I have to consider is, whether, though I am not bound by *Cooke* v. *Crawford*, I ought to follow it or not.]

The actual decision in *Cooke* v. *Crawford* is to be found in the first and fourth paragraphs of the judgment. It is the fifth paragraph, in which the Judge protests against a proposition, apparently advanced during the argument, that alone has given rise to unfavourable comment. That proposition was that it was a beneficial thing for a trustee to devise the trust estate: and the Judge appeared to think that such a devise might be a breach of trust. But, as was pointed out by Vice-Chancellor *Parker* in *Wilson* v. *Bennett* (5), that formed no part of the actual decision in *Cooke* v. *Crawford*, a decision of which Vice-Chancellor *Parker*

(1) 11 Jur. (O.S.) 721.
(2) 3 E. & E. 685, 699.
(3) 13 Sim. 91.
(4) Sug. V. & P. 14th Ed. pp. 665, 666.
(5) 5 De G. & Sm. 475.

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seems to have approved as having been decided on the broad ground that a trust cannot be delegated to persons not contemplated in its original creation.

Vice-Chancellor *Stuart*, in *Ashton* v. *Wood* (1), and two out of three Judges in *Stevens* v. *Austen* (2), treated the doctrine of *Cooke* v. *Crawford* (3) as "established," and so does Lord *St. Leonards* (4).

Titley v. *Wolstenholme* (5) and *Hall* v. *May* (6) were decided in favour of the title made by the devisees of the surviving trustee because the testator had added the word "assigns," and it was said that that meant assigns by will only, but the reasoning seems defective, for the word naturally means assigns *inter vivos*.

We do not say that *Cooke* v. *Crawford* has never been questioned, but we do say that no Judge has yet ventured to overrule it; and we say moreover that *Mortimer* v. *Ireland* (7), *Ockleston* v. *Heap* (8), and *In re Burtt's Estate* (9) are independent authorities decided upon the same principles. We submit therefore that as the testator has not used the word "assigns," the devisees of his surviving trustee cannot execute the trust.

With regard to the question of forcing a doubtful title on a purchaser, the doubt here, if any, is occasioned by judicial decision. The *cestuis que trust*, who are interested in determining the question, are not before the Court, and the difficulty might have been avoided either by procuring that concurrence, or getting new trustees appointed by the Court.

Chitty, in reply, cited *Byam* v. *Byam* (10) with respect to the expression "my said trustees."

JESSEL, M.R.:—

As regards the question in this case, it is one of those curious questions of real property law not depending upon any ascertained or ascertainable principle, but simply upon authority.

The case is one which I am bound to decide, as between vendor and purchaser, whether a good title can be made or not. Though

(1) 3 Sm. & Giff. 436.
(2) 3 E. & E. 685.
(3) 13 Sim. 91.
(4) Sug. V. & P. 14th Ed. p. 665.
(5) 7 Beav. 425.
(6) 3 K. & J. 585.
(7) 11 Jur. (O.S.) 721.
(8) 1 De G. & Sm. 640.
(9) 1 Drew. 319.
(10) 19 Beav. 58.

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I entirely agree with what the Court of Appeal decided in *Alexander* v. *Mills* (1), that it is incumbent on the Court to decide questions of law between a vendor and a purchaser, yet it must be borne in mind that any such decision does not technically bind any one else but the parties actually before the Court, and does not prevent any person not bound by the decision from at any time bringing fresh litigation upon the purchaser with reference to the same title.

I cannot help saying that, in the interests of the purchaser, who has a right to be protected, the old rule was the best, namely, that a doubtful title ought not to be forced upon a purchaser. The present rule may be right, but it is not creditable to our law that the Court should not decide so as efficiently to protect the purchaser.

This much is to be said, however; though one Judge cannot disregard a decision of another Judge as an authority influencing his decision, still, to hold that no Judge, even a Judge of the Appeal Court, could consider a title to be free from doubt when another Judge, though of an inferior Court, competent to decide the question, had pronounced the title to be defective, would be, in effect, as has been said, to leave the ultimate decision of the question to the Court below; and that was probably the reason why the Court of Appeal came to the decision it did.

The result is that I feel myself compelled to decide in this case whether this is a good title or not.

Now, in order to ascertain whether the title is good or bad, I must look at the will before me to see what it means, and then I will go on to consider what I am bound to decide upon the authorities. This being a question relating to real property, as to which the law is made by decision, and as to which, no doubt, conveyancers must be guided by existing decisions, it is of the utmost importance that what is already settled law should not be interfered with by any Court or Judge, more especially by a single Judge: therefore, if I thought that the point in this case had been settled, even by a single authority, I should follow it, whether I agreed with it or not.

Then, first of all, looking at the will, what did the testator mean? What is the meaning I ought to attribute to the expres-

(1) Law Rep. 6 Ch. 124.

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sions he has used? [His Lordship then read the will as above stated, observing that he should pass over the charge of debts, as his decision would not proceed upon that ground. His Lordship then continued:—]

Now, the first question I have to decide is, what is the meaning of "my said trustees"? It has been argued on the one side that it means the two named persons; and on the other that it means the persons who take the estate in accordance with the limitations of the will. In my opinion the latter construction is the right one. This is a gift of real and personal estate to two persons, "their heirs, executors, and administrators." It is not denied that these are words of limitation, but it is said that they are words of limitation and something more. It is said that the words "*their* heirs" shew that the testator meant that the only persons to execute the trust besides those named were the heirs of the persons named. If it is said you must adopt the literal meaning of the words, then "their heirs" must mean the heirs of both, not a single heir, for two people cannot have one heir between them; but surely the testator could not have intended that the heirs of both should execute the trust. But the words are "their heirs, *executors, and administrators:*" it could not have been intended that all these persons should act together. It is said you must distribute the words according to the nature of the estate those persons are to take: if so, that shews that the words used have reference to the nature of the estates which are the subject of the gift.

Then it is said that, the devise being in joint tenancy, what the testator means is that the persons to execute the trust are the two persons named, the survivor of them, and the heir of the survivor. But it is not rational—though it might be possible for a capricious testator to have some such intention—to suppose that he intended to repose a confidence or trust in that person, whoever he or she may be, who may happen to be the heir of the survivor of two named trustees, that is, in a person whom he has no means of ascertaining. He cannot tell whether the heir may be a man, a woman, a child, or a lunatic: he cannot even guess. To attribute to a testator the intention of reposing a personal confidence in an unascertained and unascertainable person would be absurd. There-

fore the notion of a personal confidence or trust in the heir is quite out of the question.

Then the only other possible supposition upon the question of personal confidence is that the testator intended the trust to come to an end on the death of the survivor of the two trustees named. That would be a remarkable intention to attribute to the testator, because there is a prior life estate given to the wife, and the trust for sale is not to come into effect until after her death. No doubt, if only one trustee survived the tenant for life, he could execute the trust, because there are decisions that "trustees" means "trustees or trustee;" but if both trustees died in the lifetime of the tenant for life, the trust would never take effect at all. Surely that could not have been the testator's intention.

The true view appears to me to be this: that the person to execute the trust for sale is the person who takes the estate, not by accident, so to speak, but in accordance with the provisions of the will. There is a trust annexed to the estate, and when we find who is the person who takes the estate under the will, then we find who is the person to execute the trust.

The next question, then, is, if both the trustees die before the time of sale, who is the person to execute the trust? To answer that, we must ask, who takes the estate under the will? No doubt, it will be answered, the heir of the surviving trustee; but to my mind the will should be read just as if the testator had said, "I devise and bequeath my real and personal estate to *Thomas Osborne* and *Richard Sutton*, as to my real estate, in fee simple, and as to my personal estate, absolutely." So that on the death of the surviving trustee, his heir would take, if he died intestate; but here the surviving trustee devised his trust estates.

Then do the devisees of the surviving trustee take consistently with the will? That is a most important point. It appears to me that they do; and that, there being no personal confidence reposed by the testator in the heir, he has left to the surviving trustee the duty of seeing that proper persons are selected to succeed to the trust property: in other words, he has entirely left to the surviving trustee the power of naming persons to succeed to the trust property.

By the death of the surviving trustee in the lifetime of the

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tenant for life the trust must fail altogether unless the trustee has such an implied power, although the testator evidently intends that the trust shall take effect notwithstanding that both the named trustees predecease the tenant for life.

This is, in my opinion, the rational way of reading the will, and I shall so decide, unless I find myself so fettered by authority that I cannot so decide.

Having said thus much as to the meaning of the will, I will now proceed to consider the authorities. The whole difficulty in this case arises simply from the decision of Vice-Chancellor *Shadwell* in *Cooke* v. *Crawford* (1), decided so long ago as 1842.

Now I will first say a word as to what, sitting here, I consider my duty to be as regards that case. If the case stood alone—if no Judge had said that that decision was not a good decision, I should feel it my duty at this distance of time—the case having got into the books, and it being impossible to say that it was a mistake on the part of the Judge who decided it—to follow it, leaving the Court of Appeal to deal with it. I say this, because the case is cited in the text-books sometimes with comment and sometimes without. But I think I shall be able to shew that the principle of the decision in that case has been overruled, and that the decision itself has been doubted and questioned: and if I can shew that, I shall feel bound to decide contrary to what was decided in that case.

Let us, then, look at *Cooke* v. *Crawford*, and see what the case was. In that case there was a gift which, though it might be possible to distinguish it from the gift in the present case, I shall treat as substantially the same as the gift here; and therefore that decision must govern the decision in this case, if, as I said before, I am bound by it. There the testator devised real estate to three trustees (naming them) "upon trust that they, or the survivors or survivor of them, or the heirs of such survivor, should, as soon as conveniently might be after his decease, but at their discretion, sell."

Now the gift there is distinguishable from this in two ways: First, we find no preceding gift of a life estate, so that the testator might well contemplate one or two or the whole of the three

(1) 13 Sim. 91.

trustees surviving for a sufficient length of time to enable them to sell the whole of the property: and in the second place, the gift is not to the trustees "upon trust to sell," but "upon trust that they or the survivors or survivor of them, or the heirs of such survivor," should sell: therefore it is possible to argue upon the words of that will what it is not possible to argue upon the words of this, namely, that the testator intended, however capriciously, that the heirs of the survivor should sell. Upon that will, which was dated in 1836, Vice-Chancellor *Shadwell* held that the devisees in trust of the surviving trustee could not sell; and he so decided on the ground that the heir of the surviving trustee was the person named as trustee, that no other person could properly be trustee, and that the surviving trustee had no power to devise the trust estate.

I say that I dissent from, and I hold I am entitled to dissent from, that decision. Now I will read the following passage in order to shew what was the principle governing the decision. The Vice-Chancellor says (1), "Therefore, it is plain that, when *William Hall*, who, by the disclaimer of *Burkitt* and *Woolley*, became the sole trustee, thought fit to devise the legal estate that was vested in him, he did an act which he was not authorized to do." And then he finally winds up as follows: "And here I must enter my protest"—[His Lordship read down to the words "the other must be unlawful" (2).]

I have read so much in order to shew what the ground of the decision was: the ground was that it was an improper and unlawful act of the trustee to devise the trust estate, and the Vice-Chancellor thought that if the trustee did so, his estate ought to bear the costs of getting the legal estate out of the devisee. Now, I have often said, and I repeat it, that the only thing in a Judge's decision binding as an authority upon a subsequent Judge is the principle upon which the case was decided: but it is not sufficient that the case should have been decided on a principle if that principle is not itself a right principle, or one not applicable to the case; and it is for a subsequent Judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle. In that case the prior decision ceases to be a

(1) 13 Sim. 97. (2) 13 Sim. 98.

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a binding authority or guide for any subsequent Judge, for the second Judge who lays down the true principle in effect reverses the decision.

I will now go to the second case on the subject, a case in which Lord *Langdale*, if he had not relied too much upon a particular expression in the will, would, in my opinion, have overruled *Cooke* v. *Crawford* (1), and we should have heard no more of it. That case is *Titley* v. *Wolstenholme* (2). The gift there was not quite in the same words as in the present case, or as in *Cooke* v. *Crawford*. There the testator devised and bequeathed his real and personal estate to three persons, "their heirs, executors, administrators, and assigns." Now the word "assigns" has no particular meaning: like "executors or administrators" it is superfluous. It should be noticed that the gift was not to the trustees, "their heirs and assigns," but to them, "their heirs, executors, administrators, and assigns:" it was a gift of real and personal estate. The word "assigns" was used by the old conveyancers in addition to the word "heirs" merely to shew that the grantee or devisee took an assignable estate: nothing more. The word has remained in the common forms, as many words do remain, simply because they are there, and it is much easier to copy than to expunge, and perhaps also because using superfluous words does not tend to shorten a deed.

Then the testator goes on to declare that the trusts were to be performed "by the said trustees, and the survivors and survivor of them, his or her heirs and assigns;" and those persons were empowered to sell. Then the surviving trustee by his will devised the trust estate to three persons. Reliance was placed on the word "assigns" to shew that these devisees could execute the trust. The misfortune of *Titley* v. *Wolstenholme* was that it did not expressly overrule *Cooke* v. *Crawford*, but it did so impliedly, because to read the word "assigns" literally would have been too absurd, for it would have enabled the trustees or the survivor of them to assign during their or his lifetime to any one. It was impossible to lay down any such proposition as that, and therefore Lord *Langdale* felt compelled to cut down the meaning of the word to testamentary assigns, so to speak; so that he held it

(1) 13 Sim. 91. (2) 7 Beav. 425.

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to mean something which it does not mean, since the full meaning of the word "assigns" includes assigns *inter vivos*. But to enable him so to cut down the word he was compelled to state the principle, and there he entirely differed from Vice-Chancellor *Shadwell* as to the right of the surviving trustee to devise the trust estate: on the contrary, he evidently thought that it was the trustee's duty to do so. So that the whole ground of the decision in *Cooke* v. *Crawford* (1) was denied by Lord *Langdale*.

The judgment is a long one, so I will only read a few passages from it. [His Lordship then read from the words "When a trust estate is limited to several trustees" (2), concluding with the following passage (3): "With great respect for those who think otherwise, and quite aware that some inconveniences, which can only be obviated in this Court, may arise, from devising trust estates to improper persons, for improper purposes, I cannot, at present, see my way to the conclusion, that in the case contemplated, the surviving trustee commits a breach of trust by not permitting the trust estate to descend, or by devising it to proper persons, on the trusts to which it was subject in the hands of the surviving trustee." His Lordship then continued:—] Then he goes on to decide the case, not on principle, but upon the construction of the word "assigns," which he held to mean persons who may be made such by devise or bequest.

Therefore I consider that *Titley* v. *Wolstenholme* (4), so far as it lays down a principle, is in direct conflict with *Cooke* v. *Crawford*, for in the one case it is said that it is a breach of trust for a surviving trustee to devise the trust estate, and in the other case it is said it is not.

The next case upon the subject in order of date (I will not go through them all, for I am familiar with them) is *Macdonald* v. *Walker* (5). There the testator devised his real estate to two trustees, upon trust for certain persons for their lives and afterwards to convey them to his nephews and nieces equally. And for the purpose of such division, "he did thereby authorize and empower his said trustees and the survivor of them, his heirs,

(1) 13 Sim. 91.
(2) 7 Beav. 434.
(3) 7 Beav. 435, 436.
(4) Ibid. 425.
(5) 14 Beav. 556.

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executors, and administrators, from time to time to sell." Lord *Romilly* considered that a title dependent on a sale by the devisees in trust of the surviving trustee was too doubtful to be forced on a purchaser, and in delivering judgment he made some observations upon the decisions. He first of all refers to the decision in *Cooke* v. *Crawford* (1), and then says (2): "In defence of this decision, which has been the subject of much comment, it has been urged, that the testator might have reposed confidence in the heir of the surviving trustee, but not in his devisees."

Now two points are to be observed there: first, that Lord *Romilly* understood perfectly well that the ground of that decision was such as I have already stated, but he evidently did not think favourably of it, for he immediately goes on to say, "I do not entertain that opinion. It is manifestly impossible for any man to foresee who will be the heir of the survivor of his trustees; he might be an idiot, lunatic, infant, or alien; and though it is possible or even probable, that a testator might repose a trust in two persons, and that neither of them would, by his will, select as a trustee to succeed him an incompetent or improper person, yet it is quite impossible that any reasonable man could place confidence in the person so liable to doubt and uncertainty as the heir of the survivor of two or more persons."

Therefore, upon the question of principle, we have the authority of Lord *Romilly* as well as of Lord *Langdale* against that of Vice-Chancellor *Shadwell.*

Then Lord *Romilly* goes on (3): "It is manifestly also a most inconvenient doctrine to hold, that a power is separated from, and is not incidental to and united with, the legal estate, wheresoever it may go. This decision was accordingly very much canvassed in the case of *Titley* v. *Wolstenholme* (4); and Lord *Langdale* carefully considered the matter, and delivered an elaborate judgment, which,"—and this is important—"though it does not expressly overrule the case of *Cooke* v. *Crawford* on this point, yet his observations are scarcely reconcilable with it; and he expressly decided that the survivor of several trustees, in such a case, commits no breach of trust in devising the trust estate, and

(1) 13 Sim. 91.
(2) 14 Beav. 561.
(3) 14 Beav. 562.
(4) 7 Beav. 425.

in not permitting it to descend, according to the *dictum* of Sir *L. Shadwell* in the case of *Cooke* v. *Crawford* (1). Had this case come before me when my decree would have been final as against every person who could claim an interest in the estate, I should have felt it my duty to decide between those conflicting authorities, and to have explained, at length, the reasons for my dissent from either of them."

Then he says that the case before him being one of doubt, he could not force the title on the purchaser, "whatever may be my opinion as to what probably may be expected to attend the final consideration of the question decided in *Cooke* v. *Crawford*, when that point shall be fairly reviewed, in a case where all persons interested are before the Court and bound by the decision."

Looking then at the judgment in *Macdonald* v. *Walker* (2), it appears to me there can be no doubt whatever as to what Lord *Romilly's* opinion was, and that he entirely dissented from *Cooke* v. *Crawford*, and would have overruled it had the case before him been one in which all persons interested were before the Court, and in which he could have bound all rights by his decision.

But the decision in *Macdonald* v. *Walker* had this effect, that shortly afterwards Vice-Chancellor *Shadwell's* decision was not only doubted but dissented from by two other Judges of co-ordinate jurisdiction.

In passing, I must notice the case of *Mortimer* v. *Ireland*, first of all before Vice-Chancellor *Wigram* (3) and afterwards before Lord *Cottenham* (4). That case was not the same at all as *Cooke* v. *Crawford*, but totally different. The question there was whether, when a testator had named certain persons as his trustees, without more, the devisee and legal personal representative of the survivor became trustee, or whether, on the death of the survivor, there was in fact no trustee, and whether therefore the Court could appoint new trustees: in other words, whether, on the death of the named trustees, the Court could appoint new trustees, notwithstanding that the devisee and executor of the surviving trustee was both able to act and desirous of acting in the trust. Lord *Cottenham* said that as the testator had not named

(1) 13 Sim. 91.
(2) 14 Beav. 556.
(3) 6 Hare, 196.
(4) 11 Jur. (O.S.) 721.

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the representatives of the trustees, there was no trustee, and that, therefore, new trustees must be appointed. But it seems to me that the decision would have been the same even if the representatives had been named, for the personal confidence is reposed not in the representatives but in the persons named, and therefore the representatives have no absolute right to execute the trust.

Lord *Cottenham* says (1): "Whether the property is real or personal estate is no matter, for suppose a man appoints a trustee of real and personal estate simpliciter, adding nothing more, this cannot make his representative a trustee. The case before the Master of the Rolls"—meaning *Titley* v. *Wolstenholme* (2)—"was quite different, for there the Court proceeded on the intention manifested, that the trust should be performed by the assigns of the survivor. The property may vest in the representative, but that is quite another question from his being trustee. The testator may select the heir to succeed to the trust, but he only can do so"—by which he means that the testator may say, "I declare that the heir of the survivor of my trustees, whoever he may be, shall execute the trust." It is not, however, very likely the testator would say so, though, there being no limit to the caprice of a testator, he might, but I never knew any instance of the kind.

That is all Lord *Cottenham* means, so that that case has really no bearing upon the present.

I now come to the case of *Wilson* v. *Bennett* (3). There the devise was to three trustees, "their heirs, executors, and administrators," upon trust for two persons successively for life, and after their deaths, upon trust for division among a class. Then there was a power for "my said trustees, and the survivors and survivor of them, his heirs, executors, or administrators," to sell; and the question was whether the devisees of trust estates of the surviving trustee could execute the power of sale.

It was a special case, and appears to have been previously argued and decided by Vice-Chancellor *Knight Bruce* before the case of *Macdonald* v. *Walker* (4), but it subsequently came on again before Vice-Chancellor *Parker* upon a different state of facts, which were introduced by amendment. Lord *Romilly* states in

(1) 11 Jur. (O.S.) 721.
(2) 7 Beav. 426.
(3) 5 De G. & Sm. 475.
(4) 14 Beav. 556.

his judgment in *Macdonald* v. *Walker* (1) that he had been referred by the Registrar to Vice-Chancellor *Knight Bruce's* decision, and that he had obtained a copy of the special case, but it is curious to observe that Lord *Romilly* did not notice that *Wilson* v. *Bennett* was a case of a power, not a trust.

In his judgment in *Wilson* v. *Bennett* (2) Vice-Chancellor *Parker* says, "The testator did not contemplate such an event as that the estate should vest in one person and the power go to another person. If the surviving trustee had, by any assurance made in his lifetime, conveyed the estate away so that any person other than his heir would have the estate, which alone enabled the trustees to exercise this power, I think that, upon the death of the trustee, his heir could not have exercised the power"—I doubt that very much: I should think it was the other way—"but the surviving trustee devised the estate, which amounts to the same thing." It seems to me that it is not the same thing, but something very different.

Then he says: "*Cooke* v. *Crawford* stands upon different grounds from those in this case, viz., that a trust cannot be delegated to persons not contemplated in its original creation."

Now, either that means the same thing as *Cooke* v. *Crawford* (3), or else it is a new principle: if the same thing, then I have done with it: if a new principle, then I have to deal with a decision of Vice-Chancellor *Parker* distinct from that of Vice-Chancellor *Shadwell*. But it appears to me that Vice-Chancellor *Parker's* decision proceeded on the ground that a trustee cannot devise the trust estate except in accordance with the title under which he himself holds, which would make it not a new principle at all, but the same principle over again.

Then, after stating the decision in *Cooke* v. *Crawford*, the Vice-Chancellor makes this singular remark: "The decision in that case has been often understood as going far beyond what it really imported. There is no doubt that a trustee can devise a trust estate; but the question in every case is, whether the devise is in accordance with the title under which the trustee holds. It may often be the duty of a man in such circumstances, having the legal

(1) 14 Beav. 556. (2) 5 De G. & Sm. 475.
(3) 13 Sim. 91.

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estate, to take care that it do not vest in a lunatic or in a person out of the jurisdiction, or in any other person who ought not to be a trustee, and for that purpose to devise it."

Now that, again, is in accordance with the views expressed by Lord *Langdale* and Lord *Romilly*, and is entirely opposed to *Cooke* v. *Crawford* (1). One would think, however, that Vice-Chancellor *Parker* intended to support *Cooke* v. *Crawford* on other grounds: his judgment is not very clearly expressed, but, so far as it goes, it is opposed to *Cooke* v. *Crawford*.

Then I come to the case of *Hall* v. *May* (2), which was decided by Vice-Chancellor *Wood* in 1857. It is not quite the same as *Cooke* v. *Crawford*, but the Vice-Chancellor reviews that case, and says this (3): "*Cooke* v. *Crawford*, as Vice-Chancellor *Parker* pointed out in *Wilson* v. *Bennett* (4), was decided on this principle, that, where the trust is to be executed by the trustee and his heirs, the testator does not intend the trust to be separated from the estate; and of course if you were to allow an assign to execute the trust where the testator has not said that an assign is to execute it, you are brought into this difficulty, that either the heir is to execute the trust, and then the assign is to convey, or else you allow the assign to do that which the testator has said the heir alone shall do."

That is not quite correct, for that was not the precise ground upon which Vice-Chancellor *Shadwell* based his decision.

Then Vice-Chancellor *Wood* goes on, "Whether that was the opinion before *Cooke* v. *Crawford* it is not material to inquire. It was, however, so far settled that nobody could be compelled to take a title, where, there being a trust to be performed by the original trustee or his heirs, the title had to be made through the assigns of such trustee."

Now I have read that in order to shew that as far back as 1857 the law was not settled, nor was it assumed that *Cooke* v. *Crawford* was right: the law was only settled so far as this, that the Court would not compel a purchaser to take a title through the assigns of the original surviving trustee.

Then the Vice-Chancellor, after observing that *Titley* v. *Wolsten-*

(1) 13 Sim. 91.
(2) 3 K. & J. 585.
(3) 3 K. & J. 587.
(4) 5 De G. & Sm. 475.

holme (1) has never been disapproved of, says this (2): "The argument used in *Titley* v. *Wolstenholme*, and which was the only rational argument, was, if the surviving trustee may assign by will, how can you say he is not to assign by an act *inter vivos?* And would it be right that the trustee should so assign and constitute a new trustee by such an assignment? In the case before me, I think the difficulty does not arise. It did arise in *Titley* v. *Wolstenholme*, where there was no power for the trustees or the survivor to appoint new trustees; and there the point was pressed on the Master of the Rolls, and it seems not unreasonably; but the Master of the Rolls said, that the reasons which forbade a surviving trustee making an assignment *inter vivos*, did not apply to an assignment by will, for it could not be assumed that the author of the trust placed any personal confidence in the heir of the survivor. And certainly it may well and reasonably be held, in a case like this, where the testator has expressly used the word 'assigns,' that, although a trustee cannot part with his trust by act *inter vivos*, still when the trust must depart from him by reason of death, he is at liberty by his will to make an assign to carry into effect that trust as well as to leave it to the heir." Now Mr. *Davey* has argued with great force and effect that that could not be the true *ratio decidendi* in such a case, because the word "assigns" must include an act *inter vivos*, which is the real meaning of the word.

Then the Vice-Chancellor proceeds, "As the Master of the Rolls said, it is absurd to suppose that there is personal confidence in an heir who may be a lunatic, an infant, a bankrupt, or any number of married women. To suppose that the testator reposes confidence in that very uncertain personage, which he would be unwilling to repose in a person selected by the will of his last surviving trustee, would be irrational."

We come then to this, that the real ground expressed for the decision in *Cooke* v. *Crawford* (3) is pronounced by Vice-Chancellor *Wood* to be "irrational": in other words, that so far from it being a breach of trust for a surviving trustee to devise the trust estate, it is possible for him to devise it to a competent trustee.

(1) 7 Beav. 425. (2) 3 K. & J. 588.
(3) 13 Sim. 91.

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Therefore, looking at this state of things, we must consider *Cooke* v. *Crawford* (1) overruled.

But there are two other cases which it is desirable to notice. One is *Ashton* v. *Wood* (2), before Vice-Chancellor *Stuart*. The gift there was to trustees and the survivor of them, and the heirs and assigns of such survivor, upon trust to sell. The surviving trustee devised the trust estate to certain persons who sold and who filed a bill against the purchaser for specific performance. The Court, availing itself of the then state of the law, would not force the title on the purchaser, it being considered a doubtful title.

But what the Vice-Chancellor says is this (3): "Whether or not the devisee of the surviving trustee of *Harrison's* will, who is admitted to be the devisee of the trust estate, can make a good title under the trust to sell, is a point of some difficulty. It would rather seem that he can. I do not think that the doctrine of *Cooke* v. *Crawford* applies to the present case. It was decided upon a very narrow ground—as narrow a ground as could well be taken. It was held that, because the word 'assigns' was not used, the trustee for sale, on a devolution of the legal estate, had put it in such a state as that not only the person who had the legal estate could not execute the trust, but that he could devise the trust estate without the power that was annexed to it. Lord *St. Leonards*, with his great knowledge of the law in such cases, has said that this was an extremely strict construction; and he seems to regret, as I do, that it ever should have been held that a mere legal estate should pass by devise to a man who must hold it in trust for somebody, and yet that the power annexed to the legal estate was one which he could not exercise. A different view might have been taken by the Court if the matter had been fully considered upon the principle stated in the case of *Whitfield* v. *How* (4). In that case it was held that, where in a lease for a term of years there was a power that the lessee and his assigns should make leases for twenty-one years of that term, the power might be exercised by the executor of the lessee. The Court, in clear and concise language, said, 'This power is not bound up to the person, but is annexed to the estate.' That seems to shew that

(1) 13 Sim. 91.
(2) 3 Sm. & Giff. 436.
(3) 3 Sm. & Giff. 445.
(4) 2 Show. 57.

where there is a legal estate with a power annexed to it, and the legal estate is devised, the power should pass with the legal estate to which it is annexed, unless there be something peculiar to evince an intention that the power was not to be transmissible with the legal estate. But it seems that a contrary doctrine has been established in this Court, on what Lord *St. Leonards* calls a stream of authority, much too strong for me to resist."

It seems clear to my mind, from the passage I have read, that Vice-Chancellor *Stuart* disapproved of *Cooke* v. *Crawford* (1). I now come to the last case, *Stevens* v. *Austen* (2), and I must say that is the only case I can find in which *Cooke* v. *Crawford* was cited without disapproval. I cannot myself state what the Judges really decided in that case; for it is impossible not to observe that the judgments of two out of the three Judges can be read in two different ways, one being the way in which the case was considered by the third Judge, the present Lord *Blackburn*.

The action was by a purchaser against a vendor for the return of the deposit, on the ground that the vendor, who had himself purchased from the devisees of a surviving trustee, had failed to make out a good title. The title depended upon a will which was in much the same terms as the will in *Cooke* v. *Crawford*. Three Judges gave judgment, all in favour of the purchaser, and held that the title was bad.

The objections to the title were two: first, that a title could not be made through the devisees of the surviving trustees; and secondly, that the inadequacy of the price paid by the vendor to the devisees constituted a breach of trust on their part. Upon the first point, Mr. Justice *Wightman*, in delivering judgment, says (3): "The word 'assigns' being wholly omitted in the will of the first testator, the question is, can the assignee of the surviving trustee under that will make a good title?"

Now that is not a very accurate expression: by "assignee" he must mean "devisee." I do not say that a devisee or assignee by will is not included in the word "assigns;" but still that is not the natural meaning of the word.

Then he goes on: "The case of *Cooke* v. *Crawford* is a direct

(1) 13 Sim. 91.

(2) 3 E. & E. 685. 7 Jur. N.S. 873

(3) 3 E. & E. 697. 7 Jur. N.S. 875

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authority that the devisee of a trustee appointed under such a will as that of *Samuel Swift* is not a person who can give a good title to a purchaser. That decision has been commented on in many, and questioned in several, subsequent cases." So that here we have a case in 1861 in which a Judge, in referring to *Cooke* v. *Crawford* (1), says it has been questioned in several cases.

Then the learned Judge refers to other cases upon the subject, including *Ashton* v. *Wood* (2), from which he reads the passage of Vice-Chancellor *Stuart's* judgment I have already read, and then he says, "I feel myself in the same position as the Vice-Chancellor in *Wilson* v. *Bennett* (3), in which the original devise contained the same limitation as in the will before us, and the devisees of the surviving trustee were also appointed his executors, is also a decisive authority that the executors would not be the proper persons to execute the power of sale. The Plaintiff's vendor, therefore, who was the vendee of the devisees under the will of the survivor of the original trustees appointed by the will of *Samuel Swift*, did not establish such a title as the Plaintiff was bound to accept."

Now what did the learned Judge mean by that? Did he mean that the vendor could not establish a good title at all; or that he could only establish such a title as a Court of Equity would not enforce? If he meant that the vendor had not established a good title at all, why did he not say so? The phrase is ambiguous, and if the judgment stood alone I should not know what he meant. If I might be at liberty to guess, I should say that he meant such a title as a Court of Equity would not enforce.

Then Mr. Justice *Hill* says (4), using much the same words as Mr. Justice *Wightman*: "I think that the vendor, has not made out such a title as the vendee is bound to accept." Then he goes on, "According to the authorities a trust cannot be exercised by a person not contemplated in the original creation of the trust; therefore, the word "assigns" not being in the original devise, the devisee of the surviving trustee has no power to convey the estate." But that begs the question. "Whether those authorities would be upheld in a Court of Error I do not presume to say: it is sufficient for us that the law has been so laid down in a

(1) 13 Sim. 91.
(2) 3 Sm. & Giff. 436.
(3) 5 De G. & Sm. 475.
(4) 3 E. & E. 699.

Court of co-ordinate jurisdiction." Now, coming from Mr. Justice *Hill*, that expression means he is not satisfied with the authorities. Then Mr. Justice *Blackburn* says (1): "I wish to say that I am not prepared to agree with my learned Brothers in all respects as to the first ground. The first question appears to me to be whether we are not bound to decide absolutely that the vendor's title is either good or bad; or whether it is enough to say that the title is so doubtful that a Court of Equity would not decree specific performance." Now, when we get that, I think we must presume that when the other Judges said, "such a title as the purchaser was bound to accept," they did mean such a title as a Court of Equity would force on the purchaser."

Then Mr. Justice *Blackburn* proceeds, "I used to think that a Court of Law was bound to decide absolutely that the title was good or bad; but in *Jeakes* v. *White* (2), and *Simmons* v. *Heseltine* (3), though the contrary was not decided, doubt was thrown upon that view. If, therefore, I had only come to the conclusion that the title in the present case was doubtful, I should wish for time to consider whether those two authorities are so strong as to bind us. So, again, if the only objection to the title was grounded on the decision of Vice-Chancellor *Shadwell* in *Cooke* v. *Crawford* (4), I should also wish for time to consider whether we ought to be bound by that case." So that in 1861 he could not say whether they were bound by *Cooke* v. *Crawford* or not. "For although all the subsequent decisions referring to that case say that it is not overruled, they do not altogether confirm it. I do not wish to be considered as expressing an opinion that that decision was wrong: I only desire to pause before acting on it."

Upon going through the authorities carefully I think it is clear that *Cooke* v. *Crawford* is not binding upon me as an authority: it has been doubted in almost every subsequent case, and in the last case I have referred to, though it is not actually disapproved of, Mr. Justice *Blackburn* says he would like to have time to consider it, and would pause before acting upon it.

Now here I am brought face to face with the actual decision, and I have to decide whether I ought to follow it or not. Having

(1) 3 E. & E. 700. 7 Jur N S 76 (3) 5 C. B. (N.S.) 554. 5 Jur N S 270
(2) 6 Ex. 873. (4) 13 Sim. 91.

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so to decide, I am of opinion that I am not bound by *Cooke* v. *Crawford* (1), and it appears to me that the correct decision to arrive at in this case is to hold that the devisees of the surviving trustee have acquired a good title and one which they can force upon a purchaser: and I so decide.

Upon the question of costs, I do not consider that, because a particular title may be one which a conveyancer would not recommend a purchaser to accept without a decision of the Court, the purchaser ought not to pay costs if the Court is of opinion that a good title can be made: on the contrary, the general rule is to order the purchaser to pay the costs, so as to assure his title and shew that the Court entertains no doubt upon it (2). However, in the present instance, as the difficulty has arisen entirely from conflicting decisions, I make no order as to costs; but it must be distinctly understood that that is not because I have any doubt as to the title.

Of course the vendors can give a receipt for the purchase-money, there being a trust to invest for the benefit of infants.

Solicitors: *Williamson, Hill, & Co.*, agents for *Woolley, Son, & Beardsley, Loughborough; N. Jourdain*, agent for *J. Burton, Castle Donington.*

M. R. 1880 *Feb.* 23.

CORPORATION OF LONDON *v.* RIGGS.

[1879 L. 285.]

Easement—Way of Necessity—Landlocked Tenement—Change of Condition—Agricultural Land—Building Land.

Where the owner of a close surrounded by his own land grants the land and reserves the close, the implied right to a way of necessity to and from the close over the land operates by way of re-grant from the grantee of the land, and is limited by the necessity which created it.

This re-grant, however, does not create a right to a way of necessity for all purposes for which the close may at any time be used, but only such a right of way as will enable the owner of the close to enjoy it as in the condition it happened to be at the time of the re-grant.

For instance, if at the time of the re-grant the close was agricultural land,

(1) 13 Sim. 91. (2) See *Hall* v. *May*, 3 K. & J. 590.

the owner of the close can only claim such a right of way as is suitable to the enjoyment of land in that condition: he cannot claim a right of a way suitable to the user of the close as building land.

Semble, the same rule applies if the grant is of the landlocked close with an implied grant of a way of necessity over the surrounding land.

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DEMURRER.

The statement of claim alleged as follows:—

By an indenture dated the 6th of April, 1877, the Defendant *Heathcote* granted to the Plaintiffs, the Corporation of *London*, for value, certain pieces of open and enclosed land being waste land of the manor of *Chingford* and of *Epping Forest*, in the county of *Essex*, containing about 141 acres, to hold the same unto and to the use of the Plaintiffs, their successors and assigns for ever, subject to such rights of common (if any) as such hereditaments were then subject to: and the Plaintiffs thereby declared that they would hold the said hereditaments as an open space for ever, subject only to the forest laws and the rights of common (if any) subsisting over the said hereditaments or any part thereof.

By the *Epping Forest Act*, 1878, it was enacted that *Epping Forest* (which included the hereditaments conveyed by the said indenture) should be regulated and managed by the Corporation of *London* as conservators thereof. And by the said Act *Epping Forest* was disafforested: and it was provided that, subject to the provisions of the Act, the said conservators should at all times keep *Epping Forest* unenclosed and unbuilt upon as an open space for the recreation and enjoyment of the public, and should by all lawful means prevent enclosures, encroachments, and buildings, and all attempts for the purpose on any part thereof or to appropriate or use the same, or the soil, timber, or roads thereof, or any part thereof, for any purpose inconsistent with the objects of the Act.

At the date of the said indenture of the 6th of April, 1877, the Defendant *Heathcote*, and for many years continuously before and down to the date thereof, he and his predecessors in title was and were seised in fee simple of the said hereditaments conveyed by the said indenture, and also of a piece of old inclosed land of about two acres called the *Barn Hoppet*, which was entirely surrounded by the hereditaments so conveyed to the Plaintiffs.

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During such unity of seisin in the Defendant *Heathcote* of the said hereditaments so conveyed to the Plaintiffs and of the *Barn Hoppet*, and down to the acts thereinafter complained of, the *Barn Hoppet* was exclusively used for agricultural purposes, and there were no buildings thereon. There was a gate on the north-west side thereof, but no road, path, or defined track leading to such gate, or to any other part of the *Barn Hoppet*, and the Defendant *Heathcote* and his predecessors, owners of the *Barn Hoppet* and of the lands conveyed to the Plaintiffs, and the tenants of the *Barn Hoppet*, obtained access to the *Barn Hoppet*, and conveyed their crops, manure, and other things necessary for and arising from the cultivation thereof, to and from the same by crossing the lands so conveyed in various directions to and from a road or track leading from a road called *Whitehall Road* on the south side of the land so conveyed to a house called *Queen Elizabeth's Lodge* on the north side thereof, and to and from a barn near to and held with the house.

The said indenture of the 6th of April, 1877, did not expressly reserve any right of way for the Defendant *Heathcote*, his heirs or assigns, tenants or occupiers, to the *Barn Hoppet*.

The Defendant *Riggs*, in the month of September, 1879, entered into possession of the *Barn Hoppet* as tenant of the Defendant *Heathcote*, and had since made preparations for the erection on the *Barn Hoppet* of a house and other buildings for the sale of refreshments to the public. He had also dug trenches for the foundations of the house, had erected a workshop, and had drawn timber and other materials for the erection of the workshop and other buildings across the land conveyed to the Plaintiffs by the indenture of the 6th of April, 1877, and had thereby made an unlawful use of the said waste, and had injured the surface of the said land and the herbage growing thereon, and had encroached upon the soil of the said forest. He and the Defendant *Heathcote* threatened and intended to continue the said acts, and by the use of the intended buildings to attract great numbers of persons and cause them to collect together in order to visit and frequent the same, and for those purposes to cross the lands so conveyed to the Plaintiffs both in carriages and on foot, and would thereby do further injury to and make further encroachments upon the soil and herbage of the

said forest: and the Defendants respectively claimed a right so to do.

The Plaintiffs accordingly claimed, 1, that it might be declared that the Defendants were not entitled to a greater or other way to and from the *Barn Hoppet* across the lands conveyed to the Plaintiffs by the indenture of the 6th of April, 1877, than a way of necessity sufficient for the use of the *Barn Hoppet* for agricultural purposes only; and that, if necessary, the position, dimensions, and other particulars of the said way of necessity might be set out and defined: 2, that the Defendant *Riggs* might be restrained from drawing or causing to be drawn across the lands so conveyed to the Plaintiffs any timber or other materials for erecting upon the *Barn Hoppet* any building to be used for any purpose other than the ordinary agricultural purposes to which such piece of land was applied before and at the date of the conveyance to the Plaintiffs; and that both the Defendants might be restrained from otherwise using the said way of necessity, or the said lands so conveyed to the Plaintiffs, or any part thereof, as a means of access to the *Barn Hoppet* otherwise than in accordance with such declaration: and, 3, damages.

The Defendants demurred to the whole of the statement of claim, except so far as it claimed, if necessary, to have the position and dimensions of a way of necessity to the *Barn Hoppet* set out and defined. The demurrer also alleged that, except as aforesaid, the statement of claim was bad in law on the ground that the Defendant *Heathcote* and his tenants were entitled to a way of necessity to the *Barn Hoppet* across the lands conveyed to the Plaintiffs for the use of the *Barn Hoppet* for all purposes, and not for agricultural purposes only.

The demurrer now came on to be argued.

Davey, Q.C., and *H. A. Giffard*, for the demurrer:—

This demurrer raises the question whether the right to a way of necessity to and from a landlocked close over the surrounding land is a general right of way for all purposes, or whether it is limited to such a right of way as was suitable or necessary for the enjoyment of the close in the condition it happened to be at

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the time when the right first arose. The point is one upon which there seems to have been no express decision.

As regards the origin of a way of necessity, it is clear that it arises out of and is founded upon an implied grant: for where a man, having a close surrounded by his own land, grants the close to another, the grantee shall have a way to the close over the grantor's land as incident to the grant, for without it he cannot derive any benefit from the grant: and conversely, if he grants the land and reserves the close to himself, a way over the land is incident to the reservation: Notes to *Pomfret* v. *Ricroft* (1); *Clark* v. *Cogge* (2); *Proctor* v. *Hodgson* (3); *Plant* v. *James* (4); *Skull* v. *Glenister* (5); *Dutton* v. *Taylor* (6); *Packer* v. *Welsted* (7); *Jorden* v. *Atwood* (8); *Pinnington* v. *Galland* (9); *Beaudely* v. *Brook* (10). The grant arising out of the implication of necessity cannot, however, be carried further than the necessity of the case requires: *Holmes* v. *Goring* (11).

[JESSEL, M.R.:—Where the close is reserved, the right operates by way of a re-grant from the owner of the surrounding land, and is limited by the necessity which created it.]

The right must be pleaded as a grant, and the grant must be construed in a manner most favourable to the grantee; that is, as of such a way as may from time to time be necessary for the enjoyment of the landlocked close. It is in fact the same thing as an express grant by deed of a right of way *simpliciter*, in which case the way may be used for all purposes necessary for the due enjoyment of the land, whether as building land or otherwise: *United Land Company* v. *Great Eastern Railway Company* (12); *Newcomen* v. *Coulson* (13); *Finch* v. *Great Western Railway Company* (14); and in that respect differs from a way claimed by prescription, which is limited to the user: *Wimbledon and Putney Commons Conservators* v. *Dixon* (15); *Williams* v. *James* (16).

(1) 1 Wms. Saund. Ed. 1871, pp. 571–574.
(2) Cro. Jac. 170.
(3) 10 Ex. 824.
(4) 5 B. & Ad. 795.
(5) 16 C. B. (N.S.) 81.
(6) 2 Lutw. 1487.
(7) 2 Sid. 39, 111.
(8) Owen, 121.
(9) 9 Ex. 1.
(10) Cro. Jac. 189.
(11) 2 Bing. 76; 9 Moo. 166.
(12) Law Rep. 10 Ch. 586, 590, 591.
(13) 5 Ch. D. 133, 142.
(14) 28 W. R. 229.
(15) 1 Ch. D. 362.
(16) Law Rep. 2 C. P. 577.

No doubt, the question whether a grant by deed of a right of way is to be limited to a particular use may be one of construction, as in *Allan* v. *Gomme* (1) and *Henning* v. *Burnet* (2): but, where a right of way to a piece of land is granted in general terms, the right is not lost by reason of any alteration in the land: *per* Baron *Parke* in *Henning* v. *Burnet* (3).

If, then, this is a right of way for all purposes—as we submit it is—the only remaining question is, what particular kind of way does it include? Now, upon the allegations in the statement of claim, the Defendants are entitled to at least a cartway: if so, there is no authority for saying that a cartway may not be used as a carriage and footway also.

We submit, therefore, that inasmuch as the implied grant of this right is, in substance, a general grant without any limit except that of necessity, it should be interpreted as a grant of a right of way for foot passengers and vehicles of all kinds; that is to say, such a right of way as may be necessary for the present and future enjoyment of the Defendants' land.

Chitty, Q.C., and *W. R. Fisher*, for the Plaintiffs:—

We admit that a way of necessity must be regarded as originating in a grant, but we contend that the right to such a way must be limited by the necessity as existing at the time of the implied grant: thus, if at that time the land to which the right is incident is agricultural, then the subject of the grant must be an agricultural way only, that being the way necessary for the enjoyment of the land at the time of the grant. Accordingly, where the landlocked close is reserved, the reservation carries with it only such a right of way as was incident to and directly necessary for its enjoyment at the time of the reservation: *Dand* v. *Kingscote* (4); *Lord Darcy* v. *Askwith* (5); and that is really the principle to be gathered from the authorities. You cannot imply the reservation of an unlimited right. The rule is that if the grantor of a tenement intends to reserve any right over the tenement, it is his duty to reserve it expressly in

(1) 11 Ad. & E. 759.
(2) 8 Ex. 187.
(3) 8 Ex. 192.
(4) 6 M. & W. 174.
(5) Hob. 234.

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the grant; the foundation of the rule being the well-established maxim that a grantor shall not derogate from his own grant: *Wheeldon* v. *Burrows* (1); *Crossley & Sons, Limited* v. *Lightowler* (2). Ways of necessity constitute, no doubt, an exception to the rule; *Davies* v. *Sear* (3): but a way of necessity arises only by implication: that is to say, when the owner of a close surrounded by his own land grants the land to another, reserving the close to himself, you thereupon imply as against the grantee a right of way over the land. Suppose that at that time the close is agricultural land, as in the present case; why should you imply a greater right than the necessity of the case requires—a right of way for agricultural purposes only? Why should you imply in favour of the grantor, as against the grantee, the highest right known to the law, a right of way over the grantee's land for all purposes? Surely, the implication should be pressed most strongly against the grantor.

Where an easement has been granted by deed, the use of that easement must be restricted to a reasonable use for the purpose of the land in the condition in which it was when the grant was made: *Wood* v. *Saunders* (4); *Gayford* v. *Moffatt* (5); and the same rule should apply where the easement has been created by an implied grant. According to the Defendant's view, a way of necessity means a way which may be altered from time to time to suit the convenience or the necessities of the owner of the land-locked tenement: their claim is therefore for an indefinite right. At the date of the conveyance of the 6th of April, 1877, when the right to a way of necessity arose, the *Barn Hoppet* was agricultural land: for agricultural purposes a road about ten feet in width only would be sufficient, but if the land is to be treated as building land, the width of the road must depend upon the nature, number, and extent of the buildings to be erected. Even then it must only be such a road as is "necessary" for the use of the land and buildings, not such a road as may be considered convenient. It is impossible that a way of necessity can include such an indefinite right as this. *Williams* v. *James* (6) is an authority that

(1) 12 Ch. D. 31, 49.
(2) Law Rep. 2 Ch. 478, 486.
(3) Ibid. 7 Eq. 427.
(4) Law Rep. 10 Ch. 582.
(5) Ibid. 4 Ch. 133, 135, 136.
(6) Ibid. 2 C. P. 577, 580.

a right of way once created cannot be increased or altered so as to affect the servient tenement by imposing upon it any additional burden; for the grantor of an easement is entitled to have the easement fixed at the time it is created. If the Defendants are right in their contention the result is this, that the Plaintiffs' land is subject to a shifting servitude—a thing unknown to the law: but a way of necessity is a definite servitude, and, when once created, must remain the same way as long as it continues at all: *Pearson* v. *Spencer* (1): it must therefore be fixed at the time of its creation, both as regards purpose, width, and direction.

H. A. Giffard, in reply:—

It is a mere play upon words to say that a way of necessity means only such a way as was necessary for the enjoyment of the land at the time of the implied grant: it means a way necessary for all purposes to which the land can lawfully be put; or, in other words, necessarily a way because there is no other way; and that is the meaning to be gathered from the authorities.

JESSEL, M.R.:—

I am afraid that, whatever I may call my decision, it will, in effect, be making law, which I never have any desire to do; but I cannot find that the point is covered by any decided case, or even appears to have been discussed in any decided case. The only satisfaction I have in deciding the point is this, that it will in all probability be carried to a higher Court, and it will be for that Court to make the law, or, as we say, declare the law, and not for me.

The real question I have to decide is this—whether, on a grant of land wholly surrounding a close, the implied grant, or re-grant, of a right of way by the grantee to the grantor to enable him to get to the reserved, or excepted, or inclosed close, is a grant of a general right of way for all purposes, or only a grant of a right of way for the purpose of the enjoyment of the reserved or excepted close in its then state.

There is, as I have said, no distinct authority on the question. It seems to me to have been laid down in very early times—and I

(1) 1 B. & S. 571, 584; 3 B. & S. 761.

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have looked into a great number of cases, and among others several black-letter cases—that the right to a way of necessity is an exception to the ordinary rule that a man shall not derogate from his own grant, and that the man who grants the surrounding land is in very much the same position as regards the right of way to the reserved close as if he had granted the close, retaining the surrounding land. In both cases there is what is called a way of necessity; and the way of necessity, according to the old rules of pleading, must have been pleaded as a grant, or, where the close is reserved, as it is here, as a re-grant.

Now the question is, what is the re-grant? I fail to find any exact decision on the point, or anything coming near it, for it does not seem to have been discussed any where; and the only scintilla I can find going anywhere near the point is an observation of the Lord Chancellor *Cairns* in *Gayford* v. *Moffatt* (1), in which he says, reading from Mr. Serjeant *Williams'* note to *Pomfret* v. *Ricroft* (2): "This principle seems to be the foundation of that species of way which is usually called a way of necessity:" and then he goes on to say, "Now, that is exactly the interpretation of the words used in this grant, 'with all ways to the premises appertaining;' it means, with such a way as the law would hold to be necessarily appertaining to premises such as these—that is, a way of necessity; therefore, immediately after this lease was granted, this tenant occupying the inner close became entitled to a way of necessity through the outer close, and that way must be a way suitable to the business to be carried on on the premises demised, namely, the business of a wine and spirit merchant."

It is therefore obvious to me that Lord *Cairns* thought a way of necessity meant a way suitable for the user of the premises at the time when the way of necessity was created; and that is all I can find in the shape of authority on the subject.

Well, now, if we try the case on principle—treating this right of way as an exception to the rule—ought it to be treated as a larger exception than the necessity of the case warrants? That of course brings us back to the question, What does the necessity of the case require? The object of implying the re-grant, as stated by the older Judges, was that if you did not give the owner

(1) Law Rep. 4 Ch. 133, 135. (2) 1 Wms. Saund. Ed. 1871, pp. 571–574.

of the reserved close some right of way or other, he could neither use nor occupy the reserved close, nor derive any benefit from it. But what is the extent of the benefit he is to have? Is he entitled to say, I have reserved to myself more than that which enables me to enjoy it as it is at the time of the grant? And if that is the true rule, that he is not to have more than necessity requires, as distinguished from what convenience may require, it appears to me that the right of way must be limited to that which is necessary at the time of the grant; that is, he is supposed to take a re-grant to himself of such a right of way as will enable him to enjoy the reserved thing as it is.

That appears to me to be the meaning of a right of way of necessity. If you imply more, you reserve to him not only that which enables him to enjoy the thing he has reserved as it is, but that which enables him to enjoy it in the same way and to the same extent as if he reserved a general right of way for all purposes: that is—as in the case I have before me—a man who reserves two acres of arable land in the middle of a large piece of land is to be entitled to cover the reserved land with houses, and call on his grantee to allow him to make a wide metalled road up to it. I do not think that is a fair meaning of a way of necessity: I think it must be limited by the necessity at the time of the grant; and that the man who does not take the pains to secure an actual grant of a right of way for all purposes is not entitled to be put in a better position than to be able to enjoy that which he had at the time the grant was made. I am not aware of any other principle on which this case can be decided.

I may be met by the objection that a way of necessity must mean something more than what I have stated, because, where the grant is of the inclosed piece, the grantee is entitled to use the land for all purposes, and should therefore be entitled to a right of way commensurate with his right of enjoyment. But there again the grantee has not taken from the grantor any express grant of a right of way: and all he can be entitled to ask is a right to enable him to enjoy the property granted to him as it was granted to him. It does not appear to me that the grant of the property gives any greater right. But even if it did, the principle applicable to the

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grantee is not quite the same as the principle applicable to the grantor: and it might be that the grantee obtains a larger way of necessity—though I do not think he does—than the grantor does under the implied re-grant.

I am afraid that I am laying down the law for the first time—that I am for the first time declaring the law; but it is a matter of necessity from which I cannot escape.

The demurrer must, therefore, be overruled, with costs.

Solicitors for Plaintiffs: *Horne, Hunter, & Birkett,* agents for *T. J. Nelson,* City Solicitor.

Solicitors for Defendants: *Budd, Son, & Brodie.*

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In re UNION BANK OF KINGSTON-UPON-HULL.

Limited Company—Voluntary Winding-up—Transfer or Sale of Business—Special Resolution—Dissentient Member—Notice of Dissent—Requisition to purchase Interest, when to be made—Practice—Liquidator—Application under sect. 138—*Companies Act,* 1862, *ss.* 161, 162.

Where a company in the course of being wound up voluntarily proposes to transfer or sell its business to another company, and passes a special resolution under sect. 161 of the *Companies Act,* 1862, empowering the liquidators to carry out such transfer or sale, the requisition under that section by any dissentient member of the first-mentioned company to the liquidators either to abstain from carrying the resolution into effect or to purchase his interest, must be contained in the notice of dissent, which the section requires to be in writing and left not later than seven days after the date of the meeting at which the special resolution was passed.

The liquidators in a voluntary winding-up may apply to the Court under sect. 138 of the *Companies Act,* 1862, to determine any question fairly arising in the winding-up, and any such application may be either by motion or summons.

THE *Union Bank of Kingston-upon-Hull, Limited,* which was incorporated in 1869 under the Companies Acts, passed a special resolution in June, 1879, for a voluntary winding-up and appointed liquidators for the purpose. The resolution also empowered the liquidators, under the provisions of the 161st section of the *Companies Act,* 1862, to carry out a sale and transfer of the

company's business to the *Hull District Bank, Limited*, pursuant to the terms of an agreement which had been entered into for that purpose, and under which the purchasing bank was to make allotments of its shares to a specified amount or value to the shareholders of the vending bank.

Upon a motion by the liquidators of the selling bank to restrain a contributory from proceeding to arbitration under the 162nd section of the *Companies Act*, 1862, on the footing of certain letters which, he maintained, constituted a notice to the liquidators, under the 161st section, to purchase his interest, the general question incidentally arose whether, if a member of a company dissents from the special resolution passed pursuant to the 161st section, a requisition by him under that section to the liquidators either to abstain from carrying the resolution into effect, or to purchase his interest, should be contained in the notice expressing dissent, which the section requires to be in writing and left not later than seven days after the date of the meeting at which the special resolution was passed.

Another question was, whether, under the 138th section, a liquidator in a voluntary winding-up is entitled to take the opinion of the Court upon a point by motion.

Chitty, Q.C., and *Macnaghten*, for the liquidators, submitted that the meaning of the 161st section was that the notice and requisition should both be in writing and be contemporaneous; and that the motion was regular.

G. Curtis Price (*Davey*, Q.C., with him), for the contributory, submitted that the section should be strictly construed, and referred to *In re Anglo-Italian Bank and De Rosaz* (1).

JESSEL, M.R. :—

This being a voluntary winding-up, the liquidators are entitled to have any question in the winding-up decided by me under the 138th section of the *Companies Act*, 1862. As regards this point, I think it is important to say that I am not going to cut down the meaning of the 138th section. In a voluntary winding-up a

(1) Law Rep. 2 Q. B. 452.

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liquidator may apply to the Court to decide any question fairly arising in the winding-up, and it is much cheaper to bring it before me by way of motion than by an action.

The really important point to be decided I do not think quite arises in this case, but I will express my opinion upon it as a guide to other people. The point is, whether the notice of the dissentient shareholder that he dissents, should also contain the notice either to abstain from carrying the resolution into effect, or to purchase the shares. I think it should. The Act of Parliament says that he shall express his dissent within a certain time, that is, by writing addressed to the liquidator, not later than seven days after the date of the meeting, and "such dissentient member may require the liquidators to do one of the following things." Surely that requisition is to be in writing, as well as the notice expressing his dissent. The meaning is that the whole is to be one notice in writing. The member may require the liquidators "either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned."

Here again a limit as to time is necessary. The section cannot mean that the member is to give the liquidators notice to abstain from carrying the resolution into effect, after it has been carried into effect. There must be some limit of time: it cannot be intended that the notice may be given a moment before the resolution is carried into effect, or an hour before. It is obvious that the limit of time is as much required for that notice as it is for the notice of dissent, so as to enable the liquidators to decide what to do.

The fair reading of the section is that the whole is to be in writing, and the whole is to be left not later than seven days after the passing of the resolution, so that the liquidator may have ample time to know what course he is to take. Any other construction, it appears to me, would lead to the greatest possible inconvenience, and, assuming that two readings are possible—which is the most favourable way of putting it—I think convenience requires the reading which I adopt.

His Lordship then held, upon the facts, that there had been no notice of dissent from the resolution, or requisition to purchase

under the 161st section, and accordingly granted an injunction, as asked, with costs.

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Solicitors for Liquidators: *Cunliffe, Beaumont, & Davenport,* agents for *C. J. Todd, Hull.*

Solicitors for Contributory: *Rollit & Sons.*

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[1878 M. 94.]

Husband and Wife—Debt of Wife contracted before Marriage—Liability of Husband—Action against Husband and Wife jointly—Practice—Allegation by Plaintiff of Receipt of Assets by Husband unnecessary—Married Women's Property Acts, 1870 (*s.* 12) *and* 1874.

In an action against a husband and wife married since the *Married Women's Property Act,* 1874, for the recovery of a debt of the wife contracted before the marriage, it is not necessary that the statement of claim should allege that the husband has received assets of the wife: it is sufficient that he should simply allege that the husband is liable for the debt, leaving it to the husband to exercise his option of pleading non-liability under the provisions of the Act.

A demurrer by the husband to the Plaintiff's statement of claim in such an action, on the ground that the Plaintiff had failed to allege that the husband had received assets, was therefore overruled.

The effect of the Married Women's Property Acts, 1870 (s. 12) and 1874, considered.

DEMURRER.

The statement of claim alleged as follows:—

On the 27th of November, 1876, the Plaintiff, *Eliza Sarah Matthews,* spinster, advanced the sum of £100 to the Defendant, *Esther Whittle,* who was then named *Esther Dearle,* and was unmarried; and the Defendant, *Esther Whittle,* agreed to repay the said sum of £100 to the Plaintiff on demand, and also to pay to the Plaintiff interest thereon at 5 per cent. per annum until repayment.

On the 10th of February, 1877, the Defendant, *Esther Whittle,* married the Defendant *Augustus Bramley Whittle.*

The said sum of £100, together with interest thereon from the 4th of August, 1877, being still due to the Plaintiff, she brought

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this action against the husband and wife, claiming payment by them of the said sum, together with interest until payment, and the costs of the action: also all necessary accounts and inquiries.

The husband demurred to the statement of claim on the ground that it did not allege or shew any right of action against him, or any reason or justification for joining him as a formal defendant in respect of any claim or right of action thereby alleged against his wife.

J. Beaumont, for the demurrer:—

This demurrer raises the question whether the Plaintiff should not have alleged that the husband has received assets of the wife. The liability of the husband for the debts of his wife contracted before marriage was abolished altogether by the *Married Women's Property Act*, 1870. Then the *Married Women's Property Act*, 1874, enacts that the husband shall remain liable provided he has received property of the wife, and to that extent only. The object and meaning of the Act of 1874 is indicated by the preamble, which is as follows: "Whereas it is not just that the property which a woman has at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage, and the law as to the recovery of such debts requires amendment." Reading the sections by the light of the preamble, it would seem that the husband only remains chargeable for the debts of the wife as having received assets of the wife: that is to say, unless he receives assets he is not chargeable. The Plaintiff should, therefore, have averred that the husband has received assets: if she had done so there would have been a proper pleading, and one which he would have been required to answer.

Stirling, for the Plaintiff:—

An allegation that the husband has received assets is not material to be inserted in the statement of claim, any more than it is necessary in an action against an executor for administration to aver that the executor has received assets of his testator.

The 1st section of the Act of 1874 repeals the 12th section of the Act of 1870, and restores the old law by making the husband

and wife jointly liable for debts of the wife contracted before marriage. The Act then goes on to point out how the husband may escape or reduce his liability, but it is for the husband to choose whether he will pay the wife's debts (whether she has property or not) or whether he will avail himself of the benefit of the limited liability conferred by the Act. It is for the husband alone—not for the Plaintiff—to raise the question, and therefore, if the husband elects to claim the benefit of the Act, he must plead accordingly.

Beaumont, in reply :—

The case of an executor is different, for the fact of a man being an executor places him under a *primâ facie* liability ; but that is not so in the case of a husband : the Act of 1874 only imposes a charge upon him in respect of assets of the wife come to his hands.

JESSEL, M.R. :—

The question I have to decide is more a matter of form than of substance : it is whether, in an action brought against a husband and wife after the *Married Women's Property Act*, 1874, by a creditor of the wife's before marriage, it is necessary that the Plaintiff should state that the husband has received assets of the wife.

As I have already said, it is a matter of form. It is difficult to see why the Plaintiff should be required to make any allegation at all. If the husband wishes to escape liability wholly or partially, he may plead no assets, or assets to a certain amount only, and the action may then be tried on replication.

The *Married Women's Property Act*, 1870, enacted (s. 12) that, in the case of a marriage after the Act, the husband should not be liable for the debts of his wife contracted before marriage : but the 1st section of the Act of 1874 restored the liability of the husband ; so that if that section stood alone the husband would remain liable as he was originally at the common law. Then the 2nd section says : "The husband shall in such action . . . . be liable for the debt . . . . to the extent only of the assets hereinafter specified ; and in addition to any other plea or pleas may plead

M. R. 1880 MATTHEWS v. WHITTLE.

that he is not liable to pay the debt . . . . in respect of any such assets as hereinafter specified; or, confessing his liability to some amount, that he is not liable beyond what he so confesses." Then follow these words, "And if no such plea is pleaded the husband shall be deemed to have confessed his liability so far as assets are concerned."

Therefore, when we come to look at the section, it means this—the Plaintiff simply alleges that the husband is liable: the husband must then plead that he is not liable: if he does not do so—if he does not claim the benefit conferred upon him by the section—he remains liable. But whether he will claim the benefit of the section or not is purely optional; he is not bound to do so. So that until he has pleaded the Plaintiff does not know whether he claims the benefit of the section or not. If he does not, then the Plaintiff will recover judgment.

I therefore overrule this demurrer.

Solicitors for Plaintiff: *Barnes & Bernard.*
Solicitor for Defendants: *C. F. Yorke.*

In re DIAMOND FUEL COMPANY.

V.-C. M.
1880
Feb. 26.

METCALFE'S CASE.

Company—Director—Gratuitous Shares—Fiduciary Capacity—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4.

A director of a company was ordered, under the 165th section of the *Companies Act*, 1862, to pay the full value of shares received by him from the promoter, upon which no money had been paid:—

Held, upon motion to commit him to prison for non-payment of the money, that his case was not that of a defaulting trustee within the meaning of the *Debtors Act*, 1869, s. 4, but of a shareholder who had not paid the full amount due from him.

Motion to commit refused.

THE *Diamond Fuel Company* was formed in January, 1873, for the purchase from *D. Barker* and *T. D. Clare* of certain patents and other property. The consideration agreed to be paid to the vendors was £15,000 in cash, and the allotment to them of 8200 fully paid-up shares in the company of £5 each of the nominal value of £41,000. The articles provided that the 8200 shares to be so issued to *Barker* and *Clare* should be deemed to be fully paid-up shares, and that the articles should operate as a contract under sect. 25 of the *Companies Act*, 1867, and indemnify the holders of such shares from any liability to pay the amount thereof in cash. At a meeting of the directors on the 4th of March, 1873, after the formation of the company, the purchase-money agreed upon was paid to the vendors of the patents, and the 8200 fully paid-up shares were allotted to them.

Subsequently *Barker* transferred 170 of his shares, and *Clare* transferred 940 of his shares, to *Metcalfe*, who was a director of the company, in each case for a nominal consideration. The whole of these shares were registered in *Metcalfe's* name, and he never paid any money in respect of them to the company. At the commencement of the winding-up of the company, which took place on the 1st of February, 1879, 855 of these shares remained registered in *Metcalfe's* name; the remaining 255 he had transferred to other persons before the winding-up, some for value, and the rest for a nominal consideration.

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The liquidator took out two summonses, one relating to the 855 shares, and the other relating to the 255, asking in each case that *Metcalfe* might be ordered to pay the full nominal value of the shares.

The summons came on to be heard before Mr. Justice *Fry* on the 28th of July, 1879, when two orders were made: one was an order that *Metcalfe* should pay the sum of £4275 cash, the full nominal value of the 855 shares of £5 each in the said company of which he was the registered holder, and the other order was that he should pay £1275 cash, the full nominal value of 255 shares of £5 each of which he was the registered holder, and which subsequently, but prior to the said order for winding up the company, were transferred by him.

Those orders were confirmed on appeal on the 26th of November, 1879; reported (1).

This was a motion on behalf of the official liquidator of the company that *William B. Metcalfe* might, for default in payment of £5550, being the amount due from him under the two orders made by Mr. Justice *Fry* dated the 28th of July, 1879, be committed to prison for the term of six weeks, unless he should sooner pay the said amount.

Since this notice of motion was given, which was for the 6th of November, 1879, *W. B. Metcalfe* had been adjudicated a bankrupt.

Glasse, Q.C., and *Seward Brice*, for the official liquidator:—

This notice of motion was given on the 6th of November last. We have applied on several occasions that Mr. *Metcalfe* should be ordered to attend to be examined touching the matters connected with this company, but he has never yet come up for examination. He has now become bankrupt, and our principal object is to have him examined. We submit that Mr. *Metcalfe* has rendered himself liable to be committed to prison, as coming within the exception in the 4th section of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62). He has already been made liable, under the 165th section of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), to pay the full value of the shares held by him, on the ground that he was guilty

(1) *Ante*, p. 169.

of a misfeasance or breach of trust in relation to the company. As a director he was in the situation of a trustee for the company. That was decided in *Imperial Mercantile Credit Association* v. *Coleman* (1).

He therefore stands in a fiduciary character towards the company, which brings him within the exception comprised in the 4th section of the *Debtors Act*, of "Default by a trustee or person acting in a fiduciary capacity, and ordered to pay, by a Court of Equity, any sum in his possession or under his control." The principle we now ask the Court to act upon was laid down in *McKay's Case* (2).

Higgins, Q.C., and *Everitt*, for *W. B. Metcalfe*:—

We contend that Mr. *Metcalfe* does not come within the third exception of sect. 4 of the *Debtors Act*. The orders made upon him are that he shall pay the sum of £5550, being the full nominal value of the shares of which he was the registered owner. The greater number of the shares, that is, 855 shares, were standing in his name at the date of the winding-up, and the rest had been transferred by him to other persons. The first order is simply an order to pay for the shares he was held to have contracted to purchase. The second order is in the shape of damages assessed for the amount of the shares which it was held he ought not to have sold. He cannot under these orders be considered a defaulting trustee or person acting in a fiduciary capacity, and ordered to pay a sum in his possession or under his control. The 855 shares are in his possession, and he is quite willing to give them up, but the money never was in his possession. The shares were transferred to him as a gift, by way of recompense for the labour he had gone through in establishing the company. The 255 shares he sold, but he is not ordered to pay the amount he received for them; he is ordered to pay the full nominal value, which is a sum imposed on him by way of damages or compensation in respect of what the Court considered to be a misapplication of the shares.

This question was much considered in *Middleton* v. *Chichester* (3),

(1) Law Rep. 6 Ch. 558; Ibid. 6 H. L. 189. (2) 2 Ch. D. 1.
(3) Law Rep. 6 Ch. 152.

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where it was held that, for the purpose of bringing a trustee within the third exception of sect. 4, it must appear that the money ordered to be paid by him had at some time been actually in his possession or under his control. Therefore no attachment could be issued against a trustee on an order directing the payment of a sum composed of principal and interest not distinguished, inasmuch as the interest might not at any time have been in his possession or under his control. Here the charge upon Mr. *Metcalfe* is by way of equitable damages resulting from a breach of trust, and most certainly he never had any interest upon the amount of any of the shares sold by him.

[They also cited *Carling's Case* (1).]

Glasse, in reply, cited *Evans* v. *Bear* (2), where it was held that in order to bring a trustee within the 4th section of the *Debtors Act* it was not necessary that the money should have been in his sole possession or under his sole control, but that a trustee was liable for money drawn out by his co-trustee from a bank and misapplied, and a writ of attachment was issued against him for non-payment of the money.

MALINS, V.C. :—

This is an application that Mr. *Metcalfe*, who was a director of the *Diamond Fuel Company*, should now be cross-examined with a view to his being committed to prison for non-payment of a sum of money, which he has been ordered by Mr. Justice *Fry* to pay, and which order has been affirmed by the Court of Appeal; the order, therefore, that he shall pay the money is absolute, and it amounts to between £5000 and £6000. Since the order was made Mr. *Metcalfe* has become bankrupt, and I am told there is very little prospect of his estate paying much; but that circumstance would have no influence on the question whether he is or is not liable to be committed under the Act for the abolition of imprisonment for Debt.

We all know that by the Act of 1869 imprisonment for debt is abolished, except in certain cases. The 4th section of the Act is this, " With the exceptions hereinafter mentioned no person shall

(1) 1 Ch. D. 115. (2) Law Rep. 10 Ch. 76.

after the commencement of this Act be arrested, or imprisoned for making default in payment of a sum of money." Then come the exceptions thereinafter mentioned, the third of which is, "There shall be excepted from the operation of the above enactment, default by a trustee, or person acting in a fiduciary capacity, and ordered to pay by a Court of Equity any sum in his possession or under his control."

Now, if these sums of money between £5000 and £6000 are within the meaning of this Act, "any sum in his possession or under his control," in a fiduciary character as a trustee, then the exception applies to him, and he would be liable to be committed. If this had been money which he had received belonging to the company, and he had misappropriated it, then it is perfectly clear he would have been liable to be committed. But as I understand the orders, they do not proceed on that ground. He is a director, and he is a shareholder. Undoubtedly, as a director, it was his duty, not only to pay his own shares, but to see that all other shareholders paid theirs; and that he was guilty, therefore, of default there can be no doubt; but the question is, Is he guilty of the default which is specified in the third exception? Now, as I understand the meaning of the order, it is this—He held certain shares which he believed to be fully paid-up shares, but which the Court decided were not fully paid-up shares, but that he was liable to pay upon them, as having been issued, for the full amount of the calls. Was that money in his hands, therefore, in a fiduciary capacity? If he is merely a director who has taken shares, and not paid upon them, I cannot conceive when he is ordered to pay money, that he is ordered to pay in a fiduciary capacity. He is ordered to pay as an ordinary shareholder. No doubt he is guilty of that default which I pointed out, that it was his duty not only to pay for his own shares, but to make others pay who were liable, and to that extent he is guilty, and in his fiduciary character; but is the money in his hands in a fiduciary character? because, unless the money he is ordered to pay has been in his hands in a fiduciary character, then I take it to be quite clear that he is not within the exception.

The case of *Middleton* v. *Chichester* (1) seems to me very ap-

(1) Law Rep. 6 Ch. 152.

V.-C. M. 1880 METCALFE'S CASE.

plicable to this case, because there the Defendant *Chichester* had received a sum of between £4000 and £5000 in his character of trustee. That money was in his hands; but the order which was made upon him ordered him to pay interest upon it, and the decision of the Court of Appeal was that, although £4000 and odd were in his hands in a fiduciary character, the interest which he was liable to pay had never been in his hands in a fiduciary character, and therefore the order could not stand.

Now, therefore, was this money ever in the hands of Mr. *Metcalfe* in a fiduciary character? I put the case of an executor who was indebted to the estate of his testator, by which I mean not a debt incurred after the death of the testator, but money which he owed to the testator when he died. Is that money in his hands in a fiduciary character? As I conceive, certainly not; and therefore that executor who owed a sum of money to his testator, and who has made default in payment, is not in default in his fiduciary character; the money never was in his hands in a fiduciary character, but merely as indebted to the estate. Mr. *Glasse* referred to the case of *Evans* v. *Bear* (1), but that is quite the contrary case. It was a case in which the executors were indebted to the estate after the death of the testator for money which they had in their hands as trustees and executors, which money one of them, the unfortunate *Bear* who was committed, allowed to be misappropriated by his co-trustee. That money was in his possession or under his control as trustee. That is a totally different case from the one I suggested, and I have no doubt whatever that if this money had been money which Mr. *Metcalfe* had drawn out of the coffers of the company, money which had once belonged to the company, and had got into his hands, he would have fallen within the description of default by a person in a fiduciary character; but these orders do not proceed, as I read them, on the ground of his being in default in any fiduciary character whatever, but merely as being in default as a shareholder, and in no other capacity, although it may be true, as Mr. *Glasse* suggests, that some of the shares which he ought to have paid for, he has sold and obtained money for them. I cannot go into that question now, because the order does not state any such fact, and

(1) Law Rep. 10 Ch. 76.

does not proceed on that ground. The order, in my opinion, proceeds simply on the ground, not that he is a director, but that he is a shareholder who has not paid his shares, which he ought to have paid, and being a shareholder who has not paid, therefore, the order was made that he should pay, and in no other capacity. The penal clause ought to be construed strictly, and I am of opinion it cannot be considered that he was in default as a person acting in a fiduciary capacity as to these moneys. Therefore the case is not within the exception, and he is not liable to be arrested for non-payment of this debt.

Solicitors: *E. Beall; Argles, Rand-Bailey, & Argles.*

V.-C. B.
1879
Nov. 11, 12, 14.

FOX *v.* HAWKS.
HAWKS *v.* FOX.

[1878 F. 95.]

Assignment of Leaseholds by Husband to Wife "as her separate Estate"—Declaration of Trust—Principal and Agent—Fraudulent Mortgage by Agent—Liability of Principal.

17 Ch D 416
41 & 42 Vict. c. 94
21 Ch D 661.

A husband, being about to leave *England* for a residence in *India*, executed an assignment by deed to his wife, who was to remain in *England*, of a leasehold dwelling-house, "to hold the same unto" the wife, "her executors, administrators, and assigns, as her separate estate." No trustees were appointed; the husband and wife being the only parties to the deed. The title deeds were allowed to remain in the possession of the wife:—

Held, that the deed of assignment operated as a valid declaration of trust in favour of the wife.

The wife, having parted with possession of the deeds (all but the assignment) to an agent, in order to raise a sum of £200 upon them for the wife, and having asked for a return of the deeds without success, the agent, by forging the name of the husband to a mortgage deed and other instruments, raised a sum of £1200, which he appropriated to his own use:—

Held, that there was no such negligence on the part of the wife as to bar her title to relief against the mortgagees.

Trial of Action.

In 1875, the Defendant, *Henry Clinton Fox*, being about to leave *England* for a prolonged residence in *India*, was asked by his wife to make a provision for her, she not being about to accompany him, and by an indenture dated the 23rd of February, 1875, and expressed to be made between *Henry Clinton Fox* of the one part, and the Plaintiff, *Emma Alice Fox*, of the other part, a leasehold house, No. 39, *Weighton Road, South Penge Park, Penge, Surrey*, was assigned by *H. C. Fox* to *Emma A. Fox*, "to hold the same unto the said *Emma A. Fox*, her executors, administrators, and assigns, as her separate estate," for the residue of the term.

The title deeds of the house, and the assignment, were left with Mrs. *Fox* (as Mr. *Fox* in evidence said, without his consent), and shortly afterwards, in the early part of 1875, *H. C. Fox*, took his departure for *India*.

In January, 1877, Mrs. *Fox*, at the request of *Horace Keymer*,

a stockbroker, delivered to him the deeds and documents of the house, including the deed of assignment, in order to raise £200. *Keymer* having been told that the deed of gift was worthless as a security, returned that instrument to Mrs. *Fox*.

In the same month of January, *Keymer* took the deeds, without the deed of assignment, to Mr. *Frederick Foss*, of the firm of *Foss & Legg*, solicitors, of 3, *Abchurch Lane*, and endeavoured to obtain an advance upon them, representing that he was instructed by *Henry C. Fox;* but the attempt failed.

Again, in March, 1877, *Keymer* applied to *Foss*, and told him that he had advanced £1000 on the property, and that it was leased at £100 a year. *Foss* thereupon applied to his partner, Mr. *George Francis Legg*, who entered into a negotiation with the Defendants *Robert Shafto Hawks* and *James John Stokes*, solicitors, for an advance of £1200 out of their own moneys, on a mortgage of the property.

On the 15th of April Mr. *Foss* was called upon by *Keymer* with another man, named *Taylor*. The latter said he wanted cover from *Keymer* for £1000, and *Foss* was requested to draw up a letter assigning to *Taylor* an alleged letter of charge on the property from *Keymer* ~~to Taylor~~, which *Foss* up to that time had not seen. *Foss* drew up the letter, which was signed by *Keymer*, *Foss* attesting it.

At a subsequent interview, upon its being stated by *Keymer* that the house was occupied by a tenant who was not under any agreement to pay the rent, *Foss* said a difficulty might arise with the mortgagees, whereupon *Keymer* offered to obtain a lease of the house from Mr. *Fox* himself; and a deed was prepared by *Foss* accordingly, which *Keymer* took away, and afterwards brought back, with what purported to be *Fox's* signature attached to it.

About the 20th of April Mr. *Legg* attended by appointment at *Keymer's* office to obtain the mortgagor's (*Fox's*) execution of the mortgage deed, and authority to pay the mortgage money to *Foss & Legg*, but not finding *Keymer* in he came away, bringing the documents back. Afterwards *Keymer* sent to ask that the documents might be sent to him, and they were taken to him by a clerk of *Foss & Legg*. *Keymer* desired the clerk to leave them, which he did, and the next morning they were sent back with what

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purported to be the signature of *Fox* attached, and an authority to receive the mortgage money was also sent with a signature purporting to be *Fox's*. The signatures of *Fox* were attested by *Keymer*, and were all forged.

On the 24th of April, the day of completion, Mr. *Millar*, a managing clerk from Messrs. *Hawks*, attended at the office of *Foss & Legg* (*Legg* only being present), and whilst he (*Millar*) was there, *Taylor* came in and produced the letter of charge purporting to be by *Fox* to *Keymer* (also a forgery), and the assignment by *Keymer* to himself, and asked to be paid the £1000. *Millar* complained of not being informed before of the charge (which *Legg* had never seen till then), but in the result a cheque for £1200, drawn by *Hawks & Co.* in favour of *Foss & Legg*, was handed by *Millar* to *Legg*, who thereupon drew a cheque for £1000 and handed it to *Taylor;* and five documents, viz., a receipt drawn by *Millar* and signed by *Taylor*, the forged charge in favour of *Keymer*, the assignment of the same to *Taylor*, the forged authority to pay, and the forged mortgage deed, were handed to *Millar*. *Legg* thereupon drew a cheque in favour of *Fox*, for the balance, and handed it to *Keymer*. It was afterwards presented and paid. It was indorsed with a signature purporting to be that of *Fox*, which was also forged.

On the 8th of May, at an interview between *Keymer* and *Foss*, one *David Croll Dalgairns* being present, *Keymer* asked *Foss* to act for him in certain affairs, all of which appeared to *Foss* to be tainted with fraud, and *Foss* accordingly desired first to be satisfied as to the validity of the mortgage transaction. Thereupon *Keymer* on the following day produced and handed to *Foss* the following letter, which was written and signed by Mrs. *Fox*:—

"39, *Weighton Road, Anerley.*
9th May, 1877.

"My dear Mr. *Keymer*,—With reference to the mortgage for £1200 you have lately effected for my husband upon the above property, I beg to inform you that I am desirous of paying off the amount, and I shall feel glad if you will return the deeds as soon as possible. Yours truly,

"*Alice Fox.*

"Mr. *Horace Keymer.*"

On the 1st of November *Foss* wrote to Mrs. *Fox*, referring to her letter of the 9th of May, reminding her that the interest on her husband's mortgage was then due, and asking for a cheque for £30, the amount; and on the 5th of November, 1877, *Keymer* paid to *Foss & Legg* £30, which he said, untruly as it appeared, that Mrs. *Fox* had asked him to pay.

In March, 1878, *Keymer* absconded. He was now undergoing a sentence of penal servitude for another offence.

On about the 1st of April, 1878, *Foss* received a letter of that date from Mr. *George Blagden*, stating himself to be the solicitor of Mr. *Henry Fox*, and that he was instructed to apply for delivery of the title deeds of the house, which he understood were in his (*Foss's*) possession, and if an appointment was not made to hand over the deeds, asking from whom and under what circumstances the firm of *Foss & Legg* received them. *Blagden*, throughout, was instructed by Mrs. *Fox*.

To this letter *Foss & Legg*, on the 2nd of April, 1878, answered, expressing great surprise, and stating that they were instructed in the year before by Mr. *H. C. Fox* to obtain a mortgage of the house, that they accordingly did so, and that they handed the deeds to the mortgagees' solicitors. Further, that they had applied to Mrs. *Fox* in October last for the interest, and had received it and paid it to the mortgagees. An explanation then followed, which led to a discovery of the fraud.

The Plaintiff deposed that the letter of the 9th of May was written by her at the dictation of *Keymer*, and that what appeared to be £1200 was £200 when she wrote and signed it. The £200, it was alleged and not denied, was altered to £1200 after the letter was written, and before it was brought to *Foss*.

Plaintiff also deposed to the fact that, after she had been told by *Keymer* that he could not get her £200 on the deeds without Mr. *Fox's* signature, she repeatedly asked him to return her the deeds, that he always made her some excuse for not returning them, and never did return them. In April he told her the deeds were in the hands of his solicitors. In March, 1877, she heard of a Mr. *George Legg*, a surveyor, having called to look through the house, she not being at home. Thereupon the Plaintiff, with her daughter and another lady, on the 23rd of March called upon *George Legg* at his offices, and upon inquiry heard from him that

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the property was for sale, and were referred by him to *Foss & Legg*. On going thither Plaintiff saw *Foss*, who told her he was going to dispose of the house, whereupon she said that she was the owner, and that her husband was in *India*. *Foss* shewed her the deeds, and upon her inquiry how he came by them he referred her to *Keymer*.

In explanation of her signature of the letter she deposed that, being at *Keymer's* house, which was a few doors from her own, and a Mr. *James Dalgairns* being present, *Dalgairns* said that *Keymer* had got into trouble, and he (*Dalgairns*) was going to help him out, and that as he (*Keymer*) had her title deeds, if she would give him a letter it would enable her to get them back. *Dalgairns* further said the letter was to be that she was to acknowledge the £200, which would enable him to get back the deeds. She then wrote the letter at *Keymer's* dictation, putting the amount mentioned in it at £200.

Neither *Keymer* nor *David Croll Dalgairns* nor *James Dalgairns* was called as a witness.

Between Mr. *Foss* and Mrs. *Fox* there were conflicting statements as to what took place at the interview at his office of the 23rd of March, 1877, the principal being this: *Foss* asserted that after the interview, as the three visitors were leaving, two of them, namely Mrs. *Fox* and another, came back, and Mrs. *Fox* said, "I should like to tell you, as Mr. *Keymer* instructs you, it is all right," or to that effect. Mrs. *Fox* denied that she made any such remark, or that she returned at all.

The action was commenced by writ issued on the 7th of June, 1878, between Mrs. *Fox*, by her next friend, against the mortgagees, *Hawks* and *Stokes*, and Mr. *Fox*, claiming to have delivery of the deeds to her, with damages for wrongful detention, and an injunction.

The Defendants, the mortgagees, by their statement of defence, alleged that the £1200 was borrowed of them by *Foss & Legg*, on the instructions of *Keymer*, ostensibly for Mr. *Fox*, with the connivance and complicity, or at any rate by means of the negligence, of the Plaintiff; that she was aware that *Keymer* was in possession of the deeds, and that *Foss & Legg* were negotiating a loan on behalf of her husband upon the instructions of *Keymer*, and that she expressed to Mr. *Foss* her satisfaction with the instructions

that *Keymer* might give. They also alleged that she had, since the completion of the mortgage, recognised the mortgage as being one effected on behalf of her husband or by his authority, as appeared by the letter of the 9th of May, 1877, and by the claim made by Mr. *Blagden*. They offered to be redeemed on payment to them of £1200 with interest and costs.

By an amended statement of claim the Plaintiff offered, upon delivery of the title deeds, to repay to *Hawks & Co.* the £200 and interest advanced to her by *Keymer*, and claimed to have the forged documents delivered up to be cancelled.

The Defendant *Fox*, in his statement of defence, said that the Plaintiff urged him to execute a deed of gift of the house to her, as she imagined or had been advised that it would be of some value to her; but that notwithstanding she afterwards asked him for a power of attorney to enable her really to deal with it; that she was told by his (Defendant's) solicitor that the deed was not worth the paper it was written on either as against her or against Mr. *Fox's* creditors; and the Defendant did not admit that the deed had or was intended to have any operation whatsoever. He also claimed delivery up by the Defendants *Hawks & Co.* of all the title deeds.

Mrs. *Fox*, in cross-examination, admitted that she received from Mr. *Fox's* solicitor a letter stating the worthlessness of the deed, but further stated that in conversation the solicitor told her the deed needed two trustees, and that it would be all right—that it only needed two trustees. She also admitted having, on the 6th of September, 1878, after action commenced, written to her husband asking for a power of attorney to enable her to sell the house.

The Defendants, the mortgagees, also delivered a counter-claim, seeking a declaration that they had a valid mortgage on the house, and foreclosure; and asking that the Plaintiff might be ordered to deliver to them the deed of assignment.

Hemming, Q.C., *Christopher James*, and *John Rose*, for the Plaintiff:—

The deed of assignment was a good deed, and created an estate in the wife for her separate use.

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Such a deed is perfectly good and binding as between husband and wife, whatever may be the effect of an imperfect assignment as between persons who are not in that relation. The husband could not assign the legal estate in the leaseholds to his wife, but he could, and he did, constitute himself a trustee for her, for her separate use: *Baddeley* v. *Baddeley* (1).

The mortgagees do not pretend to have the legal estate—so that here there are two equities, one of the Plaintiff, the other of the Defendants, Messrs. *Hawks*. Which of the two is the better? *Keymer*, having obtained the deeds, kept them by fraud, committed a fraud with them and pocketed the money. It cannot be pretended that Mrs. *Fox* was personally a party to the fraud—what is really relied on is, that her negligence makes her liable. That is the issue in the case upon the evidence. It must be shewn to the satisfaction of the Court that Mrs. *Fox* left the deeds, suspecting that *Keymer* was about to commit a fraud by means of them. The evidence wholly fails to shew this. Mrs. *Fox* was deceived throughout. If the charge of fraud or negligence fails, the case of the Defendants, the mortgagees, fails altogether.

Sir *H. Jackson*, Q.C., and *Heath*, for the Defendants *Hawks & Stokes*, the mortgagees:—

We admit that we are not in a position to prove the execution of the mortgage by Fox.

As to the assignment, we admit it was inoperative at law; but we say it was valid in equity. It has been argued that the assignment was a voluntary conveyance; but it has been held that a settlement of leaseholds is not voluntary: *Price* v. *Jenkins* (2).

As between husband and wife this instrument was perfect as a declaration of trust: *Baddeley* v. *Baddeley*. *Richards* v. *Delbridge* (3), referred to by Vice-Chancellor *Malins* in his judgment, is distinguishable.

Nothing that was said in *Warriner* v. *Rogers* (4) or elsewhere overrules or weakens Lord *Hardwicke's* statement of the law in *Lucas* v. *Lucas* (5).

(1) 9 Ch. D. 113.
(2) 5 Ch. D. 619.
(3) Law Rep. 18 Eq. 11.
(4) Ibid. 16 Eq. 340.
(5) 1 Atk. 270, 271.

Where, then, is the equity to deprive us of these deeds? The legal estate is undoubtedly in Mr. *Fox*, so that the title is equitable only, and the question is, as between *Fox* and us, who has the better equity? She authorized *Keymer* to borrow £200, and he deceived her and borrowed £1200. It has been argued that this is a simple case of principal and agent, where the agent defrauds the principal. But, in truth, Mrs. *Fox* and *Keymer* were one, she trusted him with the entire dominion of her property. How can she be treated as an innocent party—innocent of such negligence as makes her liable? *Perry Herrick* v. *Attwood* (1). To the extent of the £1000 she must suffer for the fraud.

H. F. Bristowe, Q.C., and *W. P. Beale*, for the Defendant *Fox*:—

We claim all the deeds. As to the assignment, if *Fox* be a trustee, as trustee he is entitled to hold the deed. But, in truth, this was not a valid declaration of trust. It needed a power of attorney to enable the wife to use it. In *Baddeley* v. *Baddeley* (2) there was the word "settle," which does not occur here. The doctrine now is, that if there be indication of an intention to benefit by transfer, and the transfer be incomplete, the incomplete transfer will not operate as a declaration of trust: *Richards* v. *Delbridge* (3). That is precisely this case.

It is said that this was not a voluntary deed, on the authority of *Price* v. *Jenkins* (4). But it is not contended that the wife could be sued for breach of a lessee's covenant under this lease. Is it arguable that it is possible for a husband to get rid of his liability as lessee, simply by assigning to his wife?

As to the mortgagees, nothing is clearer than that Mrs. *Fox* could not mortgage property which was not hers.

Hemming, in reply:—

The power of attorney might reasonably be asked for to pass the legal estate to a purchaser, as well as by reason of the doubts instilled into Mrs. *Fox's* mind as to the validity of the deed. That the deed is a good declaration of trust is clear, because the gift to separate use necessitates a trust, and no trustee being named, the

(1) 25 Beav. 205; 2 De G. & J. 21.
(2) 9 Ch. D. 113.
(3) Law Rep. 18 Eq. 11.
(4) 5 Ch. D. 619.

(1) 25 L.J. 3 Jur. N.S. 995. 4 Jur. N.S. 101.

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husband becomes a trustee. This takes the case out of all the authorities cited against us.

BACON, V.C.:—

This case has occupied a very long time; I cannot say that it has occupied too long, considering the complicated nature of it, but it seems easily resolvable into very plain principles. The suit is instituted by Mrs. *Fox*, claiming to have delivered up to her the title deeds which once were in her possession, but which now are in the possession of Mr. *Hawks* and his partner, who have advanced a sum of money upon the notion that they had a good security by way of mortgage from Mrs. *Fox's* husband. The first question which is presented is a conflict between Mrs. *Fox* and her husband, respecting the effect of the deed of February, 1875. Mrs. *Fox*, under that deed, according to the terms of it, is plainly entitled to the property in question. Mr. *Fox* insists that the property, notwithstanding that deed, belongs to him. Now, his account of it in his pleadings is this: that he, "being about to proceed to *India* in the early part of the year 1875, consulted his solicitors about making some provision for the Plaintiff during his absence; and mentioned that the Plaintiff desired him to leave the whole control of the said leasehold house and the furniture therein to her. This Defendant was advised by his said solicitors that he could vest the house in trustees upon trust for the separate use of the Plaintiff, or could execute a power of attorney in her favour at any time; but this Defendant refused to declare any trust of the said leasehold property, and declined to execute a power of attorney. This Defendant determined to make other provisions for the Plaintiff, and to reserve the question of executing a power of attorney to enable her to deal with the said house; and this Defendant communicated this decision to the Plaintiff, who nevertheless urged this Defendant to execute a deed of gift of the said house to her, as she imagined or had been advised that it would be of some value to her, notwithstanding that she might afterwards—as she in fact did—ask this Defendant for a power of attorney to enable her really to deal with the said house."

It is in that way that the Defendant, Mr. *Fox*, introduces the subject of the settlement. On being examined, he says that his

object in executing the deed was to settle this property upon his wife. There is nothing in his evidence which corroborates or justifies the passage I have just read, or the suggestion that it was only a partial interest, a prospective interest, that he meant to confer upon his wife, because in his evidence he says, "In 1874 I intended to make a settlement upon my wife, and a document was drawn up and executed for that purpose. The deed produced is that document, which is dated the 23rd of January, 1875. I then contemplated returning to *India*." The deed has been produced and read, and it is very explicit in its terms. It purports to be, and is, an assignment by the husband to the wife, for her separate use, of this property, and of other property comprised in it. So that when it was executed, it is quite clear that it was his intention, as he has said in his evidence—different from what he said in his pleadings—that he intended to make a settlement upon her. Reference is made in the pleadings to, and some sort of evidence is given of, a letter which was sent by his solicitors to himself, to this effect: "The deed is not worth the paper it is written upon, either as against yourself, or against your creditors. We wish to point out to you that in preparing this document we are acting only as your solicitors, and we shall be obliged if you will read this letter to your wife, and will procure her to sign her name at the foot of the draft, in token of her having approved it." Then it states that he did read the letter and the draft to the Plaintiff, and she signed the draft. Now, that outline so sketched is completed by the evidence he has given to-day upon cross-examination, and it throws a plain meaning upon the solicitor's letter. The solicitor, knowing that it was right that at least there should be trustees, had asked him to procure certain persons to be named as trustees. He says he declined to do that, and he asked the solicitor if he would be a trustee, and upon his declining, he made up his mind there should be no trustee at all. The reason of the solicitor's letter I take to be, in all fairness, this—"We, the solicitors, will not lie under the imputation of preparing a deed which is not perfectly valid according to its tenor. Your wife should know that. If she knows it, let her sign the note at the foot of the deed to shew that she is content with the arrangement as you repre-

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sent." Accordingly that is done, and Mr. *Fox*, knowing that to give a certain shape of validity to the deed trustees were necessary, declined to name trustees. What is the consequence of that? The legal consequence is plain and beyond doubt, that he, knowing that trustees might conveniently be appointed, chose to constitute himself the sole trustee of this deed.

Now, the case which was referred to of *Baddeley* v. *Baddeley* (1), in my opinion, if any authority was necessary—although I do not think that any authority is necessary—establishes that plainly. He became a trustee, and he relinquished all beneficial interest in the property, and, according to the doctrine now well established in this Court, a husband may, under such circumstances, become a trustee for his wife, but cannot retain any beneficial interest in the thing which is the subject of the deed.

The suggestion that there must have been a power of attorney to enable her to deal with the property may, in point of form, be perfectly true, and is perfectly consistent also with the relation subsisting between them; nor is it remarkable that she writes to him from time to time, and desires to have a power of attorney that there may be no difficulty or doubt about it. It was not necessary, if she had a full power of attorney, that the provision made for her by way of settlement—which is the expression used by Mr. *Fox* himself—should be disclosed to anybody else. That there was only one trustee, and that that trustee was the husband, is, in my opinion, not only clear upon the evidence as being the full intention of the parties, but it is clear, as a matter of law, that the deed executed under those circumstances did pass the whole beneficial interest in the property to Mrs. *Fox*, and cannot be recalled by anything that the husband can do.

Upon this part of the case, the Plaintiff, Mrs. *Fox*, and the mortgagees, Messrs. *Hawks*, are at one. The Defendants, the mortgagees, have argued in support of Mrs. *Fox's* claim to the absolute beneficial interest in this property, and I adopt their argument; and I agree, as they have argued, that there can be no doubt about the validity of the deed, nor any doubt about the legal effect of the deed now that it has been executed; and that the applications for a power of attorney which are shadowed out

(1) 9 Ch. D. 113.

and not very distinctly stated, are not inconsistent with the relation between the parties; nor is there anything unreasonable in her keeping that deed separate from the title deeds that were deposited with her.

Upon the subject of the delivery of the title deeds, all that is said about that is, that Mrs. *Fox* had them. The Defendant *Fox* says, "When I went away from *England* it was not convenient to take the title deeds to *India*," and so the Defendant accordingly left them with the Plaintiff. His present notion is, that he never intended to deliver them to the Plaintiff. They were living in the same house, and some bureau, or desk, contained the deed, which was accessible to both of them: but it is plainly in evidence, and not contradicted, that from the time of the execution of the deed, the title deeds which accompanied it had been in the possession and control of Mrs. *Fox* until she parted with them to *Keymer*. A story which Mr. *Fox* tells, that she snatched the deeds from him, is without any corroboration other than his statement. Even if she did snatch them they came into her possession: and it is the fact that for months after that he remained in *England;* because, this taking place, I think, in April, he did not depart to *India* until the following December, and during all that period no application was made by him for possession of the deeds, and there was no assertion of right on his part.

Then it is said that the settlement got into the hands of Mrs. *Rebecca Fox*. She is not called as a witness, and I cannot pay any attention, therefore, to that part of the case; but I must conclude that, the deed being operative in the manner I have expressed, the title deeds accompanied the deposit of the deed; and that the title deeds and the deed of settlement—if that is the proper description of it—became the absolute property of Mrs. *Fox*, and have remained so ever since, and are hers at this moment, although the possession has been a possession under the circumstances I have mentioned. So much for the case between husband and wife so far as relates to the possession of the deeds.

Then there remains the other not less important question; because Messrs. *Hawks & Stokes* have clearly parted with £1200 of their money upon a security which is admitted to be, or without admission is proved to be, utterly worthless, for they supposed

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they were advancing to a certain *Henry Clinton Fox* a sum of money by way of mortgage, which they paid, and took his mortgage deed for the purpose of securing the repayment of that sum. Now the evidence is clear, and it is not disputed that *Henry Clinton Fox* never did sign either the paper for securing the £1000, or the mortgage deed by which Messrs. *Hawks & Stokes* thought they had security for their £1200, nor any other of the papers which have been mentioned. That state of facts not being disputed, the Defendants, Messrs. *Hawks & Stokes*, who have acted with perfect good faith and propriety throughout the transaction, and who have parted with their money, not being able to dispute the invalidity of the security, say, nevertheless, as to the possession of title deeds of the house—they are entitled to retain them because they were induced to part with their money through the misconduct of Mr. *Keymer*, and that by the collusion, complicity, and fraud of Mrs. *Fox* they were induced to believe that they had a good security for the money they advanced. That is really the only part of the case that requires close and vigilant attention, and I do not complain even of the length at which the evidence was gone into or of the very minute analysis of the evidence which Mr. *Hemming* has gone through this morning.

Now, the principle of the law, as stated in *Perry Herrick* v. *Attwood* (1), is one which was not enunciated there for the first time, but it commends itself to the good sense and sense of justice of everybody who hears of it. In that case it was said that ladies who permit dealing with property they are interested in, by a person who has no right to deal with it, cannot afterwards complain if, by his dealing, their rights have been improperly interfered with or perhaps extinguished. What has that to do with this case? It is said that Mr. *Keymer* was the agent of Mrs. *Fox*. If he was, he was not the agent of Mr. *Fox*. The agency which he represented himself to possess, and which Messrs. *Foss & Legg* no doubt believed he did possess, was an agency on behalf of the husband, Mr. *Fox*. Mrs. *Fox* was nowhere mentioned, and she has never done anything to constitute him her agent by any outward sign; but what she did was this—placing a certain trust in *Keymer*, and being desirous of borrowing money,

(1) 25 Beav. 205; 2 De G. & J. 21.

she employed him to endeavour to negotiate for her a loan on this property. He does so, or pretends that he does so. The loan is not negotiated, and she desires to have her deeds back again. She puts an end to the agency as between her and *Keymer*, and over and over again, upon evidence which is not attempted to be contradicted, she endeavours to get possession of her deeds. I say not contradicted; and I say that, bearing in mind certain paragraphs of the statement of defence and counter-claim. She over and over again demands the return of these deeds. She does effectually put an end to the supposed agency, and upon this subject there might have been evidence adduced which might have supported the contention of the Defendants, Messrs. *Hawks & Stokes*, whatever might be the ultimate result of it. For there was Mr. *Keymer*, a person whose evidence would not be received without considerable caution, but who was to be brought here, as I was told over and over again, *in vinculis*, from the place of confinement to which he has been consigned by reason of his misconduct. He was in Court, as I was told, and he was not called as a witness upon this matter. There is no witness upon this matter except Mrs. *Fox* herself, and she has positively denied any such imputation, or the ground of any such imputation, as is suggested by the defence. It does not quite rest there, because, at a period subsequent to the execution of the mortgage deed, there was a letter of the 9th of May, in which Mrs. *Fox* plainly recognises an authority, or at least shews a readiness to adopt whatever had been done or might be done by *Keymer* to the extent of £200. Mrs. *Fox's* account of that is clear, perfectly distinct, and entirely consistent with all the rest she has said, and, I may do her the justice to observe, that there is not in any part of this case, any one thing said by any other witness, or any one thing done or said, or written by her which would induce me to disbelieve the entire statement she has made. But upon the subject of that letter there was also the means of giving evidence. There was one man of the name of *Dalgairns*, whom I expected to be called in support of the story. He has not been called. I expected also—although I do not say it was necessary—that a Mr. *Taylor*, who was said to have been known to Mr. *Foss* and his partner, Mr. *Legg*, would have also been brought as a witness. There has, however, been no such evidence tendered.

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Now, Mr. *Taylor's* appearance would have been satisfactory to me at least. I should have been able to know under what circumstances that assignment which *Keymer* pretended to make, or did make, to Mr. *Taylor* of the debt of £1000 described as charged upon this property was made. I have had no explanation whatever given to me of it, even by *Keymer*. I should not have been satisfied without having had also the explanation of Mr. *Taylor*. The case in that respect is a mere blank.

Then upon what ground can I say, on the evidence in this case, that Mrs. *Fox* has neglected any prudent precaution, or put it in the power of Mr. *Keymer* to represent that he was her agent, acting for her in procuring the loan of money? First of all, in point of fact there was no such suggestion. Treating her as the wife of Mr. *Fox*, it might make a sufficient case of negligence if she desired *Keymer* to raise the money in the name of *Henry Clinton Fox*. There is not the slightest evidence that anything of the sort was done. That Messrs. *Hawks & Stokes* should lose their money is a matter very much to be regretted; but if they have been deceived in this matter with forged documents, they are imposed upon, they are robbed—but that is no reason why Mrs. *Fox* should lose the property to which she is entitled, and as to which she has done nothing to lead to their loss. It is the ordinary course of business to employ an agent to raise money. It is not uncommon that the means of giving evidence of security for the loan should be placed in the hands of that agent. So far the relation of principal and agent may be said to have been constituted; but not one step has ever been taken upon that by *Keymer*. There is no suggestion or pretence made that *Keymer* ever represented himself to be the agent of Mrs. *Fox*. Upon Mr. *Foss's* evidence I have only one observation to make. I have no doubt that Mr. *Foss* treated it as a mere matter of business; and the fraud that has been practised was wholly without his knowledge, or without his having any reason to believe that the transaction was fraudulent. The only part of his evidence upon which I think it necessary to make any observation is this: that after that conversation between himself and Mrs. *Fox*, when she, alarmed at the notion of a valuer coming to her house, and talking about selling it, came to him, and said, "What are you going to do with

my house ?—it is my house, Mr. *Fox* is my husband ;" when she goes to inquire about that, all he does is to refer her to Mr. *Keymer*, which is not unlikely nor unbusinesslike at all. She goes at his recommendation to *Keymer*. The only point is, that Mr. *Foss* says, that the conversation having ended, of the three ladies who had been present at the earlier part of it, two came back and one said, "If Mr. *Keymer* has instructed you, it is all right." Upon that there is an important conflict of evidence. Mrs. *Fox* denies that it was she, and her daughter denies that her mother ever went back into that room in which the conversation had taken place. Whatever might be its weight or value, I do not stop to consider, nor is it at all necessary that I should ; because upon that fact there is a total absence of any evidence, or a contradiction of what Mrs. *Fox* says. It is almost admitted. When I say admitted, it has been admitted by the Defendants that unless they can prove fraud or negligence on the part of Mrs. *Fox* they can have not only no title to the mortgage—because that is given up on the ground of forgery—but they can have no title to retain the deeds —deeds relating to another person's property—for they cannot say it is theirs, and they do not pretend to say it is theirs. They are satisfied that the deed is a forgery, but they desire to retain possession of these deeds. It would be an exceedingly proper thing if there were any more pointed or pertinent evidence of the alleged complicity. But I must say it is wholly disproved. In my opinion there is no foundation whatever for saying that Mrs. *Fox* by any part of her conduct has done anything that could mislead these gentlemen who have lost their money.

It therefore only remains for me to say that these forged deeds which they have in their possession must now be delivered up to be cancelled, because they might otherwise interfere, at some future day and under other circumstances, with the plain title which Mrs. *Fox* possesses. The alleged mortgage is a merely invalid transaction, and the deeds must be delivered up to Mrs. *Fox*, and for this reason. Mr. *Fox*, who says he is a trustee only of these deeds, but who says, being a trustee he is entitled to the possession of the deeds, at the same time, at the bar and by a sort of innuendo in the pleadings, says he means to make what I take to be an improper use of these deeds ; for he says that he means

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to keep them for himself. He has parted with the whole of that interest which he once had in this property by means of the settlement. Although I think there is no difference, as I suggested to Mr. *Bristowe*, between the word "assignment" and the word "settlement," I adopt the word "settlement," because I find it in the witness's own statement, that by signing the deed he meant to settle the property upon his wife. Of course he suggests there was a condition to it, which condition I can pay no attention to, because it exists nowhere in the shape of evidence, and it is inconsistent with all he has done in the matter. There will be a declaration that *Fox* is a trustee for the Plaintiff, and Mrs. *Fox* having offered by her pleadings to pay the mortgagees £200, that must be a condition of delivering up the forged deeds and instruments. The Defendants *Hawks & Stokes* must pay the Plaintiff's costs. No costs of the Defendant *Fox*.

Solicitor for Plaintiff: *George Blagden.*
Solicitors for Defendants: *Hawks & Stokes; Lattey & Hart.*

YATES *v.* FINN.

V.-C. H.

1880

Jan. 28.

[1873 Y. 12.]

Partnership—Death of Partner—Business carried on by Surviving Partner—Use of Deceased Partner's Capital—Division of Profits.

A. and *B.* having carried on business in partnership with unequal capitals for a term of years, under articles which provided for an equal division of profits after payment of interest upon their respective capitals, continued, after the expiration of the articles, to carry on business until *A.'s* death upon the footing of the articles. At *A.'s* death his capital was more than three times as large as that of *B.*, and *B.*, who claimed under the expired articles the right to purchase the business, continued, without the consent of *A.'s* representatives, to carry it on and to use *A.'s* capital therein. In 1873, *A.'s* representatives commenced this suit against *B.*, and at the hearing in 1875, it was decided that *B.'s* option to purchase ceased when the articles expired. The business was then sold under the order of the Court, after having been thus carried on for about three years:—

Held, on further consideration, that after making a proper allowance to *B.* for managing the business, the profits earned since *A.'s* death must be divided between *A.'s* representatives and *B.*, according to the proportion in which the partners were entitled to the capital employed in the business.

BY partnership articles dated the 31st of December, 1847, *Yates & Finn* agreed to carry on the business of lamp manufacturers in *New Bond Street*, under the firm of *Smethurst & Co.*, for the term of ten years from the 16th of August, 1847; the capital of the partnership was to consist of the sum of £14,057 18*s.*, of which in effect £11,057 18*s.* was brought in by *Yates* and £3000 by *Finn*. Before any division of profits was made, each partner was to be entitled to interest after the rate of £5 per cent. per annum upon the amount of capital from time to time remaining to his credit in the business, and, subject thereto, the profits were to be equally divided between them. The articles also contained a proviso that in case *Yates* died during the partnership, leaving *Finn* surviving, *Finn* should, upon making certain payments, be entitled to the entirety of the estates, stock in trade, and effects, constituting the capital of the partnership.

Under these articles *Yates & Finn* carried on their business in partnership together until the 16th of August, 1857, when the

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term of ten years expired, after which time they continued to carry on the business upon the footing of the articles without any express agreement, dividing the profits in equal shares.

Yates died on the 30th of June, 1873, having by his will appointed the plaintiffs his executors. After his death *Finn* continued to carry on the business, and to retain and employ *Yates'* capital therein, claiming to be entitled to the entirety of the business under the proviso in the partnership articles.

In December, 1873, the Plaintiffs filed their bill in this suit for a declaration that after the expiration of the ten years' term the partnership was carried on as a partnership at will, and that the proviso in the articles entitling *Yates* to the entirety of the partnership property in case of *Finn's* death, was not operative after the expiration of the term, and they prayed that the partnership affairs might be wound up upon the footing of these declarations, and that *Finn* might account for and be charged with a proper proportion of the profits of the business since the death of *Yates;* that the business and goodwill might be sold as a going concern, and for a receiver and manager.

Upon the hearing of the cause on the 1st of May, 1875, the Vice-Chancellor held that the partnership was, after the 16th of August, 1857, a partnership at will; and that the proviso for purchase was not operative or applicable after the expiration of the ten years term; and made the ordinary partnership decree directing the usual accounts and inquiries, with liberty to apply as to a sale of the business and goodwill as a going concern; and this decree was affirmed on appeal by the Lords Justices.

The business with the goodwill was sold under the direction of the Court in July, 1876.

On taking the accounts directed by the decree, the question arose whether the Plaintiffs were entitled to interest from the death of the testator upon the amount by which the capital belonging to him, and retained in the business, exceeded the capital of *Finn* therein; and in April, 1877, the Vice-Chancellor decided that they were not.

By the certificate of the Chief Clerk, dated the 23rd of July, 1879, it was found that the surplus assets consisted of a balance of £15,912 15*s.* 9*d.*, of which £12,018 11*s.* 2*d.* was capital belonging

to the estate of *Yates*, and £3294 4*s.* 7*d.* capital belonging to *Finn*; that he had taken an account of the trading since the death of *Yates*, and that the net profits arising therefrom amounted to £8483 9*s.*, and after allowing (*inter alia*) to *Finn* £1450 for his services in managing the concern, he found in effect that the net profits were divisible between the estate of *Yates* and *Finn* in equal shares.

The Plaintiffs then took out a summons to vary this certificate by disallowing the £1450, and by dividing that sum and the net profits between the estate of *Yates* and *Finn*, according to the proportions in which that estate and *Finn* were respectively entitled to the capital in the business.

W. Pearson, Q.C., and *Everitt*, for the Plaintiffs:—

This is a case in which the Defendant, as the surviving partner, has carried on the business for three years after the dissolution of the partnership by the death of his co-partner, and has, without the consent of the representatives of the deceased partner, retained and employed in the business the capital of the deceased partner. That capital was nearly three times as large as his own, and the profits earned since the testator's death ought to be divided rateably between the testator's estate and the Defendant in proportion to the amount of capital belonging to each: *Lindley* on Partnership (1); *Mellersh* v. *Keen* (2); *Crawshay* v. *Collins* (3); *Wedderburn* v. *Wedderburn* (4); *Willett* v. *Blanford* (5).

[HALL, V.C., remarked that it might be necessary to continue a business for the purpose of winding it up, and referred to *Simpson* v. *Chapman* (6).]

This is a case of wrongful retainer, under a claim of right which has been disallowed; and as it has been held by the Court, following *Barfield* v. *Loughborough* (7), that we are not entitled to interest on the testator's excess capital, the case is still stronger in favour of our being allowed the full profits earned by his capital. In case the profits are divided in proportion to the

(1) 4th Ed. p. 976, *et seq.*
(2) 28 Beav. 453.
(3) 15 Ves. 218; 1 Jac. & W. 267; 2 Russ. 325.
(4) 22 Beav. 84.
(5) 1 Hare, 253.
(6) 4 D. M. & G. 154.
(7) Law Rep. 8 Ch. 1.

2 Jur. N.S. 674

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capital, we shall not object to the sum of £1450 allowed to the Plaintiff for management, to which he is probably entitled: *Brown* v. *De Tastet* (1).

Hastings, Q.C., and *G. Curtis Price*, for the Defendant:—

The Defendant did not exclude the Plaintiffs, but carried on the business for the benefit of all parties. If the Plaintiffs had been dissatisfied with the conduct of the Defendant they might at any time have obtained a receiver. The case of *Willett* v. *Blanford* (2) shews that there is no general rule that as between the surviving partner and the estate of the deceased partner the amount of the capital belonging to each is to be the basis upon which the proportion of profits is to be calculated. It is obvious that the skill or connection of the surviving partner may have had more effect in earning the profits than the capital of the deceased partner. The general rule is rather that the profits earned after dissolution must, in the absence of agreement, be divided equally, whether the capital of the partners has been equal or not: *Watney* v. *Wells* (3). And the cases in which this rule has been departed from have been either cases in which the capital has been wrongfully employed, or cases in which the trader continuing the business has been a trustee: *Lindley* on Partnership (4). In the present case there has been neither wrongful employment of capital nor fiduciary relationship, as is in fact shewn by the decision of the Court, in 1877, refusing interest on the capital of the testator.

Everitt, in reply.

HALL, V.C.:—

This case is one in which a partner has died leaving a surviving partner, who has carried on the business, keeping and using in it the larger capital of the deceased partner, as well as his own smaller capital, to which I may add, as a material ingredient existing in this particular case, claiming to be entitled as surviving partner to take the business, including the goodwill of the concern, on certain terms, and to carry on the business on his own

(1) Jac. 284.
(2) 1 Hare, 253.
(3) Law Rep. 2 Ch. 250.
(4) Pages 976, 977.

account, a contention which the Court has held not to have been well founded. In such a case as this I think that, notwithstanding what was done in *Watney* v. *Wells* (1), the correct principle to be applied (in the absence of other special circumstances affecting the rights of the deceased partner on the one hand and the surviving partner on the other) is this: that the representatives of the deceased partner are entitled to say to the surviving partner, "You have been using our testator's money in trade, and making profits by the use of it, and we are therefore entitled to an account of the profits you have made by continuing that money in the concern and trading with it." Of course I do not mean to say that there may not be special circumstances which may vary the case. The observations of the Vice-Chancellor *Wigram*, in *Willett* v. *Blanford* (2), that you must look at all the circumstances of the case to see what is right and equitable as between the parties in reference to the continued business, may be applied to all these cases; and where there have been profits made by the joint capital of the two partners, and the capital of one of the partners vastly exceeds the capital of the other, I should say it is ordinarily just and right that the profits made by the business should be apportioned according to the capital employed in it. I quite admit at the same time that there may be sums which could be legitimately and properly claimed on behalf of the surviving partner before the ascertainment of what were profits. In that view it seems to follow that it is not otherwise than proper, in this case, to allow this sum which has been allowed for management, and to make that allowance before the ascertainment of profits. I cannot, however,—because in the ordinary case of partners living and acting together and trading with unequal capitals, the profits would, in the absence of agreement to the contrary, be divided equally—apply that rule to a case like this, where the business has been carried on after the death of one of the partners, the partnership having, as I conceive, ceased entirely at the time of the death. The partnership having so ceased, I do not consider there is anything in this partnership contract to which I can have regard upon the question what rights there may be as to sharing the profits after the death. I cannot have regard to that. If I could have regard to it in an ordinary

(1) Law Rep. 2 Ch. 250. (2) 1 Hare, 253.

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case, I could not do so here, where, as it seems to me, the surviving partner has asserted rights in respect of this partnership to which he was not entitled, the effect of which was to defer for a considerable period of time the ascertainment and distribution of the funds between the parties entitled to them. Therefore, it seems to me that the certificate was wrong in dividing the profits equally.

I should say, with reference to the case of *Watney* v. *Wells* (1), that the arguments which were addressed to the Court in that case upon the state of the assets were such as rather to shew that it was thought not improbable that giving back to each partner his capital, with its accumulations, would, or might pretty nearly, exhaust the whole fund. It does not appear at all from the report, whether the mode of division of the surplus profits was thought worth consideration. I do not think that I can regard that decision as at all a considered judgment upon that part of the case; or as standing in the way of the view which I think ought to be taken as to the principle to be adopted in a case like the present with reference to the division of profits in a partnership business carried on after the decease of one of the partners by the surviving partner; and so carried on not temporarily for the purposes of, and with a view to, a winding-up of the concern. As to the principles to be adopted in the case of such a temporary carrying on, I say nothing one way or the other. I do not consider that in reality is this case. It seems to me the certificate is wrong, and therefore it must be altered as I have indicated.

Solicitors: *Harrison, Beal, & Harrison; Frederick Taylor.*

(1) Law Rep. 2 Ch. 250.

POTTER *v.* JACKSON.

V.-C. H.
1880
Feb. 17.

[1878 P. 25.

Practice—Partnership Action—Costs.

The balance found due in a partnership action from the firm to one of the partners must be paid out of the assets in priority to the costs of the action.

Austin v. *Jackson* (1) approved and followed.

THIS was a partnership action between two partners interested in equal shares, and the usual accounts and inquiries had been directed and referred to the official referee. The referee had found that a balance of £1620 1*s.* 3*d.* was due to the Plaintiff in respect of rent of property belonging to the Plaintiff and occupied by the partnership, and of capital advanced by the Plaintiff. The entire assets of the partnership consisted of the sum of £2000 in Court, and the action having come on for further consideration, the question was which ought first to be paid thereout, the balance due to the Plaintiff, or the costs of the action.

Millar, and *Warrington*, for the Plaintiff:—

The sum found due to the Plaintiff must be paid first, like a debt due to an outside creditor, and then the costs of the action, so far as the fund in Court will meet them, the balance, if any, being paid by the Plaintiff and Defendant in equal shares: *Austin* v. *Jackson* (1); *Nowell* v. *Nowell* (2).

W. Pearson, Q.C., and *J. Beaumont*, for the Defendant:—

The rule as to the payment of costs is the same in a partnership action as in any other administration action, namely, that the costs shall be paid out of the assets in the first instance: *Hamer* v. *Giles* (3). And the reason of the rule is that the action has been the means of preserving the assets. Accordingly, the costs

(1) 11 Ch. D. 942, n. (2) Law Rep. 7 Eq. 538.
(3) 11 Ch. D. 942.

V.-C. H. 1880 POTTER v. JACKSON.

should be first paid, and if the fund in Court remaining after payment of costs is insufficient to pay the balance due to the Plaintiff, the deficiency must be made good by the Plaintiff and Defendant in equal shares. *Austin* v. *Jackson* (1) is at variance with *Hamer* v. *Giles* (2), and being heard in Chambers, cannot have the weight of a considered decision.

HALL, V.C.:—

It is said that the case of *Austin* v. *Jackson*, which was cited as an authority on behalf of the Plaintiff, was not sufficiently considered, or that if sufficiently considered, the decision is not in accordance with the established rule as to the payment of costs in such circumstances as the present. It is said that a partnership action is to be treated as an action for the administration of a partnership business, and that the rule as to costs therein is the same as in an ordinary administration action, namely, that the costs should be first paid out of the assets; and that this should be done before provision is made for any sums which may be ascertained to be due to one partner over the other; or, taking the question in a different way, before any provision is made for any sums which may be found due from the partnership to each of the two partners. But it appears to me very good sense that where the partnership is found to be indebted to one of the partners in respect of moneys owing to him, as in this case, for rent of property occupied by the partnership, or for sums advanced as capital of the partnership, such indebtedness to the partner shall, for the purposes of administration, be treated just as it would be if it were an indebtedness to any body else: *i.e.*, as something which must be provided for before the partners can take, as between themselves, anything as fruit of their joint adventure. That is clearly the view which the Master of the Rolls took in *Austin* v. *Jackson;* and it is a rule which I see no reason to quarrel with, for it is founded on good sense and sound principle, and I feel, therefore, I ought to adopt it. *Austin* v. *Jackson* is printed in a note to *Hamer* v. *Giles*, but no doubt the Master of the Rolls, in settling his judgment in

(1) 11 Ch. D. 942, n. (2) 11 Ch. D. 942.

the case of *Hamer* v. *Giles* (1), settled and considered his judgment in *Austin* v. *Jackson* (2) also. That case, therefore, gives a rule for the application of the assets in this particular case, upon which I shall act in the order now to be made.

Solicitors for Plaintiff: *Belt, Brodrick, & Gray*, agents for *Thomas Drake, Huddersfield.*

Solicitors for Defendant: *Learoyd, Learoyd, & Peace*, agents for *Learoyd & Co., Huddersfield.*

(1) 11 Ch. D. 942. (2) 11 Ch. D. 942, n.

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Jan. 13.

WISE *v.* PIPER.

[[1879 W. 130.]

Will—Construction—Direction to settle—Insertion of Power of Sale and Exchange.

A testator, who made his will in 1810, and died in 1820, directed by his will that his daughters' shares in his property (which consisted of realty and personalty) should be so settled that, if they married, one-half of their fortune should be settled on them and their children, exclusive of their husbands:—

Held, that this direction authorized the insertion in the settlement of a power of sale and exchange of that moiety of a daughter's share in the testator's real estate which was to be settled on her and her children.

Turner v. *Sargent* (1) followed.

Wheate v. *Hall* (2) distinguished.

THIS was an action by a vendor for the specific performance of an agreement for the purchase of land. The Defendant objected that the Plaintiff had not shewn a good title to the property. The title consisted in part of the will of one *Christian Splidt*, dated the 18th of January, 1810, and an indenture of settlement dated the 14th of July, 1824.

By his will (which was a very informal one) the testator (after giving some legacies to his wife) proceeded thus: "I have £40,000 in freeholds which had better not be sold but remain for my children;" and, after giving some other legacies, and appointing trustees and executors, he proceeded: "My property consists of shipping, freehold estates, cash in trade, copyholds and leaseholds, and bonds and debts. All the residue of my estate and effects, including what shall fall in, I give to all my children that I shall have living at my death or born in due time after, that is, to the trustees. The girls' shares to be so settled that, if they marry, one half of their fortune shall be settled on them and their children, exclusive of their husbands, and, in case of their death without children, to go to the other children, and, if they all die without children, then to go to my brothers and sister *Philip*, *Thomas*, and *Elizabeth*, but, if neither should be living at the death of my

(1) 17 Beav. 515. (2) 17 Ves. 80.

children without issue, then to go to my next of kin at the time of my death. If I leave boys, their shares of the girls to go to the boys absolutely in case the girls should have no children, and the shares of the boys to go to them absolutely. The shares of the boys to be paid to them absolutely when they attain twenty-one. Benefit of survivorship . . . . I am so satisfied of the propriety, where the property can afford it, of settling affairs and protecting property in the Court of Chancery, that I direct my executors to institute a friendly suit for their indemnity, and the protection of my wife, children, and property. It is my wish to preserve my freeholds and copyholds as long as can be done, and I therefore direct when any child comes of age the whole of my estate in which he or she is interested shall be valued, and so much only sold as will pay or provide his share. I mean an entire estate to be sold, so as not to sell an undivided part. I authorize my trustees to grant leases, and for building and repairing, for such term as they shall see proper."

The testator died in December, 1820, leaving a widow and an only daughter surviving him. Soon after his death his trustees and executors instituted a suit in the Court of Chancery for the administration of his estate and the execution of the trusts of his will, and a decree for that purpose was made by the Master of the Rolls on the 5th of February, 1822. In the year 1824 the daughter, being still under the age of twenty-one, with the sanction of the Court, married a Mr. *Lawrence*. Articles for the settlement of her fortune were approved of by the Master, and were executed on the 14th of July, 1824. By this deed it was agreed that one moiety of the freehold and copyhold estates which passed by the will of the testator should, so soon after the solemnization of the intended marriage as the wife should attain twenty-one, or other the circumstances of the case would permit, be conveyed and assured to the use of trustees, upon the trusts therein declared in favour of the wife and children exclusive of the husband. And it was agreed that the other moiety of the same freehold and copyhold estates should be conveyed and assured to the trustees, upon certain other trusts. And it was agreed that in the settlement or settlements to be made there should be inserted a power for the trustees, at the request of the husband and wife during

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their joint lives, and at the request of the survivor during his or her life, and, after the death of the survivor, at the request of the person or persons for the time being beneficially entitled in possession as tenant or tenants for life, or tenant or tenants in tail by purchase, to sell or exchange all or any part of the settled estates, "but, as to the said moiety first hereinbefore settled, so far only as the same moiety may be lawfully or equitably sold or exchanged in reference to the trust affecting the same by virtue of these presents and of the will of the said *C. Splidt.*" Mrs. *Lawrence* attained twenty-one on the 3rd of May, 1826, and on the 9th of June, 1827, the real estate comprised in the articles was conveyed to the trustees according to the agreement. On the 15th of September, 1874, the then trustees of the settlement, at the request of Mr. and Mrs. *Lawrence*, and professing to exercise the power of sale contained in the settlement, conveyed part of the freehold estates therein comprised to a Mr. *Patman*, a predecessor in title of the Plaintiff. The property so conveyed to *Patman* was that which the Plaintiff had agreed to sell to the Defendant. It was objected on behalf of the Defendant that the will of the testator did not authorize the insertion of a power of sale in the settlement with reference to that moiety of the daughter's share which was by the will directed to be settled on her and her children, and that no such power had been created by the settlement with reference to that moiety.

North, Q.C., and *Tremlett*, for the Plaintiff:—

The direction contained in the testator's will for the settlement of his daughters' shares authorized the insertion in the settlement of a power of sale affecting the moiety which is directed to be settled, if they should marry, on them and their children: *Turner* v. *Sargent* (1). A power of sale and exchange is a usual power to insert in a marriage settlement: *Peake* v. *Penlington* (2); *Sugden* on Powers (3); *Duke of Bedford* v. *Marquess of Abercorn* (4); *Elton* v. *Elton* (5).

[FRY, J., referred to *Horne* v. *Barton* (6).]

(1) 17 Beav. 515.
(2) 2 V. & B. 311.
(3) 8th Ed. p. 839.
(4) 1 My. & Cr. 312.
(5) 27 Beav. 634.
(6) Jac. 437.

The reason for that decision was that a power of sale was not a proper one to be exercised by the tenant for life. *Wheate* v. *Hall* (1) was decided on the ground that a direction in a will for a strict settlement of real estate would not authorize the insertion of a power of sale and exchange in the absence of an express declaration that such a power was intended. But in *Hill* v. *Hill* (2) marriage articles provided for a strict settlement of real estate, and that the settlement should contain certain specified powers, and "likewise all other powers usually inserted in settlements of the like nature," and it was held that a power of sale and exchange might be inserted. *Pearse* v. *Baron* (3) is only a decision that, there being a direction to insert a power of leasing for twenty-one years, a further direction to insert "all such other powers as are usually inserted in settlements of a like nature" did not authorize the insertion of a power to grant building leases for longer terms. The power of sale contained in the articles of July, 1824, extends to the moiety by the will directed to be settled on the daughter's marriage, if the will authorizes its extension to that moiety. That is the meaning of the proviso.

Cookson, Q.C., and *J. Chester*, for the Defendant:—

The cases relied on do not apply. *Turner* v. *Sargent* (4), in particular, was decided in 1853, and the present case must be decided as it ought to have been decided in 1824. If a power of sale was a usual power in a settlement in 1853, it does not follow that it was a usual power in 1824, and with reference to a will executed in 1810. The custom may well have changed in the interval. A power of sale is of a very different nature from the other powers which are generally inserted in settlements: *Davidson's* Conveyancing (5); *Brickdale's* Settled Estates Act (6).

The proper construction of the articles is that the power of sale does not extend to that moiety of the daughter's share which is by the will directed to be settled on her marriage. But, even if the power as expressed in the articles does extend to that moiety, it is not justified by the will. Whatever might have been the

(1) 17 Ves. 80.
(2) 6 Sim. 136.
(3) Jac. 158.
(4) 17 Beav. 515.
(5) 3rd Ed. vol. iii. p. 556.
(6) Page 7.

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effect of a direction to settle, if it had stood alone, the other expressions which the testator has used, that his freeholds "had better not be sold," and that it is his wish to "preserve" his freeholds "as long as can be done," shew that he could not have intended a power of sale to be inserted in the settlement. And the will does contemplate a sale of the property in a particular event only, viz., the attainment by the children of vested interests.

North, in reply.

FRY, J.:—

The questions for determination are two. The first is, whether the will of the testator did or did not authorize the insertion of a power of sale of one moiety of his freehold estate; and the second is whether, assuming that it did, the articles for a settlement executed in 1824 created such a power. The will is a highly inartificial document, and one upon which I have found it very difficult to put a satisfactory interpretation. Nevertheless, I have come to a conclusion from which I can well conceive any other mind differing; but such as it is I will now express it. [His Lordship referred to the provisions of the will.]

In the first place, it is clear that, having contemplated a division of his property amongst all his children, he directs his girls' shares to be settled, and to be so settled that, if they marry, one half of their fortune should be settled on them and their children, exclusive of their (which must mean his daughters') husbands. A great deal of argument has been addressed to the question whether the direction to settle applies to the entirety of the share. In my view it does not. I do not think it is very material, because the question for present decision relates to the moiety which he has directed to be settled in that specific manner.

Now I pause to ask what would be the effect of that direction, supposing that it stood by itself, not, however, forgetting that there are other clauses in the will which have to be read in connection with it. But, before I can read them in connection with it, I must endeavour to understand the meaning of the clause as it stands by itself. The direction to settle either the entirety or a moiety of the daughters' shares would, in my

judgment, have authorized the insertion in the settlement of a power of sale and exchange. Three years after the date of this will I find Lord *Eldon*, in *Peake* v. *Penlington* (1), expressing an opinion that a power of sale and exchange was a usual provision in a settlement of this description. Moreover, in *Turner* v. *Sargent* (2), Sir *John Romilly*, M.R., in the case of a very similar direction in a will, considered that a power of sale and exchange ought to be inserted in the settlement. The case of *Wheate* v. *Hall* (3) does not appear to me to conflict with that view. There the direction was that the trustees should secure the property in a particular manner. The manner in which it was to be so secured was fully detailed in the will, and the Court thought that the directions were so detailed and so fully expressed that it could not, although the trusts were in terms executory, insert a power of sale. Here there is no such defined exhaustive series of limitations pointed out by the will, and the direction to settle is fettered only by the direction that the settlement shall be on the daughters and their children, exclusive of their husbands, leaving everything else to the discretion of those who were to make the settlement.

I find, further, that the testator says, "I am so satisfied with the propriety, where the property can afford it, of settling affairs and protecting property in the Court of Chancery, that I direct my executors to institute a friendly suit for their indemnity, and the protection of my wife, children, and property." If that clause has any operation it seems to me to shew that the testator was anxious to give a large discretion to the Court of Chancery as to the manner in which his property should be settled in the event of his having daughters who succeeded to a share in it.

Such would be my conclusion if the clause of the will which directs a settlement had stood alone. How is it affected by the other clauses in the will, which I am bound to consider with it? They have caused considerable doubt in my mind. But I find that both the expressions of the testator's wish to preserve his freehold property are coupled with directions for vesting the property in his children. Both his expressions of a desire for the

(1) 2 V. & B. 311. (2) 17 Beav. 515.
(3) 17 Ves. 80.

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retention of his freehold property appear to me, therefore, to apply to the interval of time down to that period at which his children respectively are to become absolutely entitled to his property.

Now how are the children to become entitled to the property? They are to become absolutely entitled as regards the sons. They are to become entitled by way of settlement as regards the daughters. Am I then to read the expression of a desire that the freehold property shall not be sold, or shall be preserved as long as can be done, as controlling the direction which he had given as to the settlement of his daughters' shares; or am I, on the other hand, to hold that the direction to settle the daughters' shares is to prevail over the desire to preserve the property, or rather that that desire to preserve is expressed only with reference to the interval of time down to the making of the settlement? I have found it difficult to decide which of these two is the preferable view, but I think, on the whole, looking at the desire which he has expressed that his daughters' shares shall be settled, and his desire to give a large discretion to the Court of Chancery, that the true view is that his wish for the preservation of the property is expressed only with regard to the interval of time between his own death and the period when his children shall become entitled, the sons absolutely or the daughters by way of settlement, and that, therefore, the direction to preserve his property does not exclude the insertion of a power of sale in the settlement, or limit the discretion of the Court as to inserting it. On the whole, therefore, I think that the will did authorize the insertion of a power of sale.

Then comes the question whether such a power of sale has been inserted, and in my opinion it has. The articles of settlement, which were carried into effect by the subsequent conveyance, gave a power to the trustees, with the concurrence of the person or persons for the time being beneficially entitled under the settlement (I put it shortly), to sell the whole of the devised real estate; but the power is limited as regards the first moiety, that is, the moiety which is by the will directed to be settled on the daughter and her children exclusive of her husband, a proviso which appears to me to mean this:—if the power can lawfully be inserted, it is to stand as regards the entirety:—if, on the other hand, the power cannot be lawfully inserted as regards the first moiety, it is not

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to stand as regards the entirety, but is to prevail only with regard to the second moiety. I think, therefore, that a power of sale has been inserted, and that the will justified its insertion, and, consequently, that there is a valid power of sale. The Plaintiff in this case has, therefore, so far disclosed a good title, and, the Defendant not raising any other question on the title, there must be judgment for specific performance with costs. I wish to add this, that I have been asked to decide the real point, and not merely to consider whether the title was a doubtful one.

Solicitors for Plaintiff: *Barker & Son.*
Solicitors for Defendant: *Wright, Bonner, & Wright.*

MUNDAY *v.* ASPREY.

FRY, J.
1880
Jan. 14.

[1878 M. 203.]

Statute of Frauds, s. 4—*Memorandum of Agreement—Draft Conveyance.*

The memorandum or note of an agreement required by the 4th section of the *Statute of Frauds* must be a memorandum of an agreement complete at the time the memorandum is made.

A letter from an alleged purchaser inclosing and referring to a draft conveyance in which it was recited that he had agreed to purchase land:—

Held not to be a memorandum of a completed agreement.

THIS was an action by a vendor to enforce specific performance of an agreement to purchase lands. The *Statute of Frauds* was pleaded in defence.

For some time previously to the month of April, 1878, the Plaintiff and the Defendant were in negotiation for the sale by the Plaintiff to the Defendant of freehold land situate at *Caterham*, in the county of *Surrey*.

It was alleged on the part of the Plaintiff, and not disproved, that the solicitors of the Defendant, Messrs. *Robins & Peters*, were duly authorized by the Defendant to conduct the negotiations on his behalf as his agents in the transaction, and the Plaintiff alleged that Messrs. *Robins & Peters* accordingly, some time before the 10th day of April, 1878, arranged with Messrs. *Stones, Morris, & Stone*, the agents of the Plaintiff, the terms of the purchase, but

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no written memorandum was signed so as to satisfy the requirements of the 4th section of the *Statute of Frauds*.

On the 10th day of April, 1878, Messrs. *Robins & Peters* wrote and sent to Messrs. *Stones, Morris, & Stone*, as the agents for the Plaintiff, the following letter:—

"We send engrossment of conveyance together with draft. Please procure an authority from Mr. *Munday* to pay the purchase-money to yourselves. When we complete, shall we bring cash or a cheque? Our client returns from *Devonshire* to-day or to-morrow, and on seeing him we will procure a cheque and let you know when we are ready to complete.

"Yours faithfully,
"*Robins & Peters.*"

The engrossment referred to in the said letter accompanied the said letter, and was the engrossment of a deed of conveyance expressed to be made between the Plaintiff as vendor of the one part, and the Defendant as purchaser of the other part; by which deed, after reciting that by an indenture dated the 11th of December, 1876, and made between the *Commonwealth Land Building Estate and Auction Company, Limited*, of the one part, and the vendor of the other part, the pieces of land and hereditaments firstly and secondly thereinafter described were granted and conveyed unto and to the use of the said vendor, his heirs and assigns for ever, and reciting that the vendor had contracted with the purchaser for the absolute sale to him of the said land and hereditaments at or for the price or sum of £360; it was expressed to be witnessed that in consideration of the sum of £360 paid to the vendor by the purchaser at or immediately before the sealing and delivery of the said indenture the Defendant conveyed unto the Plaintiff the land which was the subject of this action. The question was, whether this letter with the inclosed draft conveyance constituted a sufficient memorandum of the contract.

Cookson, Q.C., and *Maidlow*, for the Plaintiff:—

The statute only requires evidence of the contract in writing: *Bailey* v. *Sweeting* (1); *Forster* v. *Rowland* (2). It does not matter

(1) 9 C. B. (N.S.) 843. (2) 7 H. & N. 103.

that the letter was not intended as a contract, it is sufficient evidence of a contract previously entered into. The draft conveyance referred to in the letter states the price, the description of the land, and all essential parts of the contract: *Owen* v. *Thomas* (1); *Welford* v. *Beazely* (2).

North, Q.C., and *Field*, for the Defendant, were not called on.

FRY, J.:—

I am of opinion that the Plaintiff cannot succeed in this case; he is bound to prove (the *Statute of Frauds* being pleaded) a contract signed by the Defendant or his agents. Now, even if I assume that there was ever an agreement concluded between the parties, where is the note or memorandum of it which the statute requires? There is no such memorandum in the previous correspondence of any concluded agreement by the Defendant, but I am asked to read the letter of the 10th of April, 1878, as a subsequent writing containing an admission and evidence of a previous contract. By that letter the Defendant's solicitors sent an engrossment of a conveyance of the land containing the following recital: "Whereas the vendor has contracted with the purchaser for the absolute sale to him of the said lands and hereditaments at or for the price or sum of £360." This engrossment bears no date, and is unsigned.

The question before me is whether that letter together with the engrossment was a memorandum of the contract satisfying the 4th section of the *Statute of Frauds*. My opinion is that the letter contains no more than the statement of an expectation of what Mr. *Cookson* called a *paulo-post* future contract. If I develop the meaning of the letter and the inclosed engrossment, it seems to amount to this, "We believe that there is either a contract to sell this land, or that there will be such a contract at the time when the conveyance is executed and the purchase-money paid by the purchaser." The statute requires that a concluded agreement existing at the time when the memorandum is signed should be proved by the Plaintiff, whereas the document, as I have said, shews no actual existing agreement.

(1) 3 My. & K. 353. (2) 3 Atk. 503.

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Therefore, assuming in favour of the Plaintiff that Messrs. *Robins & Peters* were duly authorized agents of the Defendant, the document which they signed only amounted to the expectancy of a contract contained in a draft conveyance which was never executed, and this is not sufficient. The Plaintiff's action fails and must be dismissed.

Solicitors: *Stones, Morris, & Stone; Robins & Peters.*

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Jan. 17.

In re BLIGHT.
BLIGHT *v.* HARTNOLL.

[1879 B. 54.]

Will—Construction—Devise subject to Contingency—Effect on Subsequent Gifts.

A testatrix devised an annuity, charged on the rental of a particular property, to her sister for her life, and after the sister's death she directed that the annuity should be applied by her executors in the following manner: viz., that the annuity should be paid to her daughter *S.* during her life, but should *S.* die in the lifetime of the testatrix, or should she survive her, then after the death of *S.*, the testatrix directed her executors to pay the annuity to *L.*, a daughter of *S.*, during her life, and if *L.*, after having commenced to receive the annuity, should die before the expiration of the term for which the property on which the annuity was charged was let, then the testatrix directed her executors to continue to pay the annuity out of the rental to the then surviving children of *L.* in equal shares, and, in the event of there being then or at any future time no such surviving children of *L.*, then the testatrix directed her executors to pay the annuity out of the rental to the surviving children of *S.* in equal shares.

The testatrix died in 1854. *L.* died unmarried in 1870. *S.* died in 1875. The sister of the testatrix died in 1877:—

Held, that the gift to the surviving children of *S.* was an independent and substantive gift, and not one of a series of gifts all dependent on *L.*'s having commenced to receive the annuity.

Held, therefore, that, on the death of the sister of the testatrix, the then surviving children of *S.* became entitled to the annuity.

THIS action was brought for the administration of the estate and the execution of the trusts of the will of *Elizabeth Blight*, widow, who died on the 15th of September, 1854.

By her will, dated the 12th of September, 1854, she devised to her sister *Christiana Hartnoll*, during her life, an annuity of £50,

to be charged on and payable out of the rental of a wharf at *Lower Charlton* belonging to the testatrix, but should she have died in the lifetime of the testatrix, or should she survive her, then after her decease the testatrix directed that the annuity should be applied by her executors in the following manner: viz., that the annuity charged in manner aforesaid should be paid to her daughter *Sarah Ann Boate* during her life, but should she have died in the lifetime of the testatrix, or should she survive her, then, after the decease of *Sarah Ann Boate*, the testatrix directed her executors to pay the annuity to *Lucy Osborne*, daughter of *Sarah A. Boate*, during the life of *Lucy Osborne*, and if *Lucy Osborne Boate*, after having commenced to receive the annuity, should die before the expiration of the term of years for which the wharf was let, then the testatrix directed her executors to continue to pay the annuity out of the rental thereof to the then surviving children of her said granddaughter, in equal shares, and in the event of there being then, or at any future time, no such surviving children of her said granddaughter, then she directed her executors to pay the annuity out of the aforesaid rental to the surviving children of *Sarah Ann Boate*, in equal shares.

Lucy Osborne Boate died unmarried in April, 1870. *Sarah Ann Boate* died in October, 1875. *Christiana Hartnoll* died on the 16th of March, 1877.

North, Q.C., and *Grosvenor Woods*, for the heir-at-law of the testatrix, referred to *Jarman* on Wills (1); *Davis* v. *Norton* (2); *Moody* v. *Walters* (3); *Lett* v. *Randall* (4); *Cattley* v. *Vincent* (5); *Boosey* v. *Gardener* (6).

Methold, for those children of *Sarah Ann Boate* who survived *Christiana Hartnoll*, referred to *Jarman* on Wills (7).

Grosvenor Woods, in reply.

(1) 3rd Ed. vol. i. p. 788, *et seq.*
(2) 2 P. Wms. 390.
(3) 16 Ves. 283, 297.
(4) 10 Sim. 112.
(5) 15 Beav. 198.
(6) 5 D. M. & G. 122.
(7) 3rd Ed. vol. i. p. 789.

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FRY, J., after stating the provisions of the will, continued :—

Lucy Osborne Boate died before her mother, and she therefore never commenced to receive the annuity. She died unmarried, and there was therefore no surviving child of hers who could take under the gift. The question is, whether the children of *Sarah Ann Boate* surviving at the death of *Christiana Hartnoll* take the annuity. That depends upon whether the gift to those children is an independent and substantive gift, or is one of a series of gifts, all of which depend upon the contingency of *Lucy Osborne Boate's* commencing to receive the annuity. I have come to the conclusion that it is an independent and substantive gift. It is to be observed that the testatrix deals with two contingencies. The first is this: "If *Lucy Osborne Boate* after having commenced to receive the annuity should die before the expiration of the term." The second runs thus: "And in the event of there being then or at any future time no such surviving children of *L. O. Boate.*" Now, following each of these contingencies is an independent and separate direction to her executors to pay the annuity, and this leads me to the conclusion that they were intended to be independent gifts. Then, has the contingency happened upon which the surviving children of *Sarah Ann Boate* are to take? If there is no child of *Lucy Osborne Boate,* there is no surviving child, and the event has happened. The gift is not affected by the previously mentioned contingency of *Lucy Osborne Boate* dying before commencing to receive the annuity. The annuity, therefore, will go to those children of *Sarah Ann Boate* who were surviving at the death of *Christiana Hartnoll.*

Solicitors: *E. W. Owles; Sismey & Cross.*

DAVIS *v.* DAVIS.

FRY, J.
1880
Jan. 29.

[1878 D. 126.]

Practice—Compromise—Intervention of Court—Retractation.

A compromise agreed to by parties in Court, after discussion of the case, with the concurrence of their legal advisers and with the assent of the Court, cannot afterwards be varied on the mere allegation that the consent was given inadvertently without evidence of mistake or misapprehension.

Dictum in *Attorney-General* v. *Tomline* (1) explained.

THIS was an action in which the Plaintiff, *C. A. Davis*, sued her son and other persons as executors of her deceased husband.

After the Plaintiff's case was opened and she had been examined at length in chief, terms of compromise were suggested by the Court, and after the Plaintiff had retired and consulted with her counsel and her present and past solicitors, heads of a compromise were drawn up and were assented to in Court on both sides with the approval of the Judge, and signed by counsel in the Plaintiff's presence on the brief of one of the Plaintiff's counsel.

Subsequently, before any order founded upon the compromise was drawn up, the Plaintiff intimated that her consent had been inadvertently given, and that she withdrew her consent to the compromise.

Thereupon *S. T. Davis*, the principal Defendant, gave notice of motion that the Plaintiff be ordered forthwith to leave with the Registrar the briefs of counsel with a view to the order being drawn up, or that the Registrar should be directed to draw up the order, or that the action should be restored to the paper.

Cookson, Q.C., and *Fellows*, for the motion, cited *Scully* v. *Lord Dundonald* (2); *Strauss* v. *Francis* (3); and contended that a compromise made after the case had been gone into before the Judge was more formal than where the matter had not been actually occupying the attention of the Court: *Holt* v. *Jesse* (4).

Fischer, for the Plaintiff, relied on *Attorney-General* v. *Tom-*

(1) 7 Ch. D. 389.
(2) 8 Ch. D. 663.
(3) Law Rep. 1 Q. B. 379.
(4) 3 Ch. D. 177.

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line (1), where it was said that "the interval between the pronouncing of a judgment by consent and it being drawn up gives an opportunity to a person who has consented to anything to ascertain the true state of the facts, and he may in that interval make an application to have the judgment varied." The application ought not to have been made by motion, but should have been the subject of a new action: *Gilbert* v. *Endean* (2).

FRY, J.:—

There is no evidence in this case that the Plaintiff has been deceived in reference to the compromise she assented to; she has not been examined before me with respect to that, and I am satisfied that she understood what was done on her behalf at the trial. She had given her evidence when the terms were suggested which were very favourable to her.

I do not say anything as to whether a consent given altogether without the intervention of the Court can be afterwards withdrawn. All that I said in *Attorney-General* v. *Tomline* was that if in any case a judgment made by consent can be varied, it must be varied before it is drawn up. But after the Court has gone into the merits of a case and assented to a deliberate compromise, it would be extremely inconvenient to allow a person who had instructed counsel to enter into such compromise to retract such consent. I entirely agree with the decision in *Holt* v. *Jesse* (3), and my order is, that the Plaintiff do within four days after service of this order leave or cause to be left at the office of the Registrar the counsel's briefs mentioned in the notice of motion, and further, that the Registrar do draw up the order accordingly.

Solicitors: *Watson; Stibbard, Gibson, & Co.*

(1) 7 Ch. D. 389. (2) 9 Ch. D. 259.
(3) 3 Ch. D. 177.

COX *v.* WILLOUGHBY.

FRY, J.
1880
Feb. 7.

[1879 C. 257.]

Partnership—Expiration of Term—Continuance of Business without Fresh Articles—Operation of Old Articles.

When, after the expiration of the term limited by partnership articles, the business is carried on by the partners without the execution of fresh articles, all those provisions of the old articles which are not inconsistent with a partnership at will continue to apply to the partnership at will thus constituted.

Under such circumstances:—

Held, that a provision in the articles that, on the decease of one of the partners before the expiration of the partnership term, the surviving partner should pay to his executors the sum of £1500, as the purchase-money for his interest in the goodwill of the business, applied to the partnership at will constituted by the carrying on of the business without fresh articles after the expiration of the partnership term.

Essex v. *Essex* (1) followed.

Cookson v. *Cookson* (2) not followed.

BY an indenture dated the 30th of January, 1849, *B. E. Willoughby* (the father of the Defendant *H. W. Willoughby*) and *Thomas Cox* agreed to become co-partners in the business of attorneys and solicitors for the term of ten years from the 12th of January, 1849. The deed contained a provision that the office where the business was carried on, and the furniture and fittings thereof, should be the private property of *Willoughby*, and should, after the expiration of the term, be retained by him, and also a provision that, in case of his death before the expiration of the term of ten years, and in case either of his two sons, *E. C. Willoughby* and the Defendant, should be an articled clerk to him at the time of his death, *Cox* should, without any consideration, take an assignment of such articled clerk for the remainder of the term of his articles, and that at the expiration of his articles, and upon his admission as an attorney and solicitor within six months from such expiration, and his request within eight weeks after his admission, *Cox* should, without any consideration, take the son as a partner for the term of ten years.

(1) 20 Beav. 442. (2) 8 Sim. 529.

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For many years prior to the date of this deed *B. E. Willoughby* had carried on business as a solicitor, and *Cox* had for some years been one of his managing clerks.

B. E. Willoughby died on the 30th of April, 1854. At the time of his death the Defendant, who was then about eighteen years of age, was under articles to his father, and had completed about two years of his articles.

By an indenture dated the 27th of March, 1855 (which contained a recital of the deed of the 30th of January, 1849), *Cox* and *C. F. Lord* agreed to carry on in partnership the business of attorneys and solicitors for the term of fifteen years from the day of the date of the deed. This deed contained various provisions commonly inserted in deeds of a similar nature, and there were (*inter alia*) the following clauses:—

3. "The said *Thomas Cox* will at all times during the partnership term, until the said *H. W. Willoughby* shall be admitted into the said partnership, continue to provide suitable chambers and offices for carrying on the said partnership business, and at his own expense provide suitable furniture and fittings for the same, and such chambers and offices, together with the furniture and fittings now in and upon and hereafter to be provided by the said *Thomas Cox*, shall, until the said *H. W. Willoughby* shall be admitted into the said partnership as hereinafter mentioned, remain and be the private property of the said *Thomas Cox*, and, on the admission of the said *H. W. Willoughby* into the partnership, the said chambers and offices, furniture and fittings, shall become and be the private property in equal moieties of the said *Thomas Cox* and *H. W. Willoughby*, and the said chambers, offices, furniture, and fixtures shall be retained by the said *Thomas Cox*, his executors, administrators, or assigns, or, as the case may be, by the said *Thomas Cox* and *H. W. Willoughby*, and their respective executors, administrators, or assigns, in equal moieties, as well during the said co-partnership as after the determination thereof.

5. "The capital stock of the said co-partnership shall be the sum of £1350, whereof fourteen equal twentieth parts and two third parts of one other equal twentieth part shall (until the said *H. W. Willoughby* shall be admitted into the said co-partnership) be contributed by the said *Thomas Cox*, and the remaining five

equal twentieth parts and one third of another equal twentieth part shall during the same period be contributed by the said *C. F. Lord;* and, after the said *H. W. Willoughby* shall have been admitted into the co-partnership, eight equal twentieth parts of the said capital shall be contributed by the said *Thomas Cox,* six other equal twentieth parts thereof by the said *C. F. Lord,* and the remaining six equal twentieth parts by the said *H. W. Willoughby.*

7. "All casual losses which shall happen to the partnership concern shall be borne by each of the partners for the time being in proportion to his share of the capital thereof, unless any such loss shall happen through the wilful neglect or default of either of the partners, in which case the loss shall be borne and sustained by such partner only.

"The net gains and profits of the partnership business, after deducting the expenses attendant thereon, shall belong to the partners in the following proportions, viz., fourteen equal twentieth parts and two equal third parts of one other twentieth part thereof unto the said *Thomas Cox,* and the remaining five equal twentieth parts and the remaining third part of the said one twentieth part thereof to the said *C. F. Lord,* until the said *H. W. Willoughby* shall be admitted into the said co-partnership, and, after the said *H. W. Willoughby* shall have been so admitted, then eight equal twentieth parts of the net gains and profits shall belong to the said *Thomas Cox,* six other equal twentieth parts thereof to the said *C. F. Lord,* and the remaining six equal twentieth parts thereof to the said *H. W. Willoughby.*

16. "In case of the decease of the said *Thomas Cox* before the articles of clerkship of the said *H. W. Willoughby* shall have expired, the said *C. F. Lord* will, without any consideration, but at the expense of the said *H. W. Willoughby,* or the estate of the said *B. E. Willoughby,* deceased, take an assignment or transfer of the said *H. W. Willoughby* for the residue then unexpired of the term of his articles. And, upon the expiration of such articles of clerkship of the said *H. W. Willoughby,* and the admission of the said *H. W. Willoughby* as an attorney and solicitor to the Superior Courts of Law and the Court of Chancery within twelve calendar months next after the expiration of his articles of clerkship, and

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the request of the said *H. W. Willoughby* to that effect within eight weeks after such his admission, and if the said *H. W. Willoughby* shall during his said clerkship have given evidence of his willingness to assist in the conduct of the said business, the said *Thomas Cox* and *C. F. Lord*, or the survivor of them, shall and will immediately, without any pecuniary or other consideration, accept and take the said *H. W. Willoughby* as a partner in the said business for the residue then unexpired of the said term of fifteen years, and thenceforth the capital of the said business (the said *H. W. Willoughby* contributing his proportion thereof as hereinbefore mentioned) and the profits of the said business, and all debts owing to the said concern, and the risks and losses thereof, shall belong to and be borne by the said *Thomas Cox*, *C. F. Lord*, and *H. W. Willoughby*, in the proportions hereinbefore directed in reference to the admission of the said *H. W. Willoughby* as a partner in the said business.

19. "On the decease of the said *Thomas Cox* before the expiration of the said term of fifteen years the surviving or other partner or partners shall pay to the executors or administrators of the said *Thomas Cox* his proportion of the profits of the said business up to the day of his death, and also the sum of £40, as and for the purchase-money of his interest in the fixtures and fittings up of the offices of the said partnership; and also the sum of £1500 as the purchase-money for his interest in the goodwill of the said business. The said sum of £40 shall be paid at the expiration of one calendar month from the decease of the said *Thomas Cox*, and his proportion of gains and profits shall be paid as and when the same shall be got in and received, and for such purpose all possible care and expedition shall be used by the surviving or other partner or partners; and the said sum of £1500 shall be paid to the executors or administrators of the said *Thomas Cox* by three equal instalments of £500 each, at the expiration respectively of six, twelve, and eighteen calendar months next after his decease, and be secured by the bond or joint and several bond of the said surviving or other partner or partners.

20. "In case of the death of the said *C. F. Lord* or of the said *H. W. Willoughby* (in case of his admission as partner) before the expiration of the said partnership term, the surviving or other

partner or partners shall pay to the executors or administrators of the partner or partners so dying as last aforesaid his proportion of the net gains and profits of the said business up to the day of his decease, at the same times or periods of division and in the same manner as during the life of such partner. And on the said deaths of the said *C. F. Lord* and *H. W. Willoughby* respectively the surviving or other partner or partners shall pay to their respective executors or administrators the sum of £750, in full satisfaction of the amount of their respective interests in the goodwill of the said business, by three equal instalments at the expiration of six, twelve, and eighteen calendar months next after their respective deaths, and such surviving or other partner or partners shall, at his or their expense, give his bond, or their joint and several bond, for securing such payment to the executors or administrators, and thenceforth the share and interest of the partner so dying in the said partnership concern shall belong to the surviving or other partner or partners in equal proportions if more than one."

On the 27th of March, 1855, after this deed had been executed, the Defendant (who was then of the age of nineteen years) read it through, and signed a memorandum on the flyleaf thereof as follows: "I have perused and do approve of the foregoing articles." His articles expired on the 2nd of February, 1857, and he was then admitted as an attorney and solicitor, and immediately afterwards he was admitted as a partner in the business, but he never executed the deed of the 27th of March, 1855. That deed remained in the possession of *Cox*, and the Defendant never saw it or any copy of it from the date of the memorandum which he had signed until after the death of *Cox*. *Lord* died in the year 1864. From the time when the Defendant was admitted a partner down to the death of *Lord*, the profits of the business were divided among the partners in the manner prescribed by the deed of the 27th of March, 1855. After the death of *Lord*, six-twentieths of the profits of the business, up to the time of his death, were paid to his executors out of the assets of the firm, and £750 was in July, 1866, paid to his executors out of those assets. After his death his six-twentieths of the profits were divided equally between *Cox* and the Defendant up to the death of *Cox*, *Cox's* share of the

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profits after *Lord's* death being treated as eleven-twentieths, and the Defendant's share as nine-twentieths. During the whole of the term of fifteen years the provisions of the deed of the 27th of March, 1855, were acted upon, with some slight exceptions. One exception was this, that the capital, instead of being contributed in the first instance in the way prescribed by clause 5 of the deed, was contributed thus: £540 (eight-twentieths) by *Cox*, £405 (six-twentieths) by *Lord*, and £405 (the remaining six-twentieths) by the executors of the Defendant's father. The Defendant after he had attained twenty-one accepted this contribution by his father's executors as a part payment of the share of his father's estate to which he was entitled. After the expiration of the fifteen years the business was continued by *Cox* and the Defendant without any fresh articles of partnership being executed. The profits continued to be divided as before. On the 4th of September, 1874, *Cox* died. After his death the Defendant continued to carry on the business on his own account. The action was brought by the executors of *Cox*, claiming payment by the Defendant of the sum of £1500, according to the provisions of clause 19 of the deed of the 27th of March, 1855, with interest, and also payment of *Cox's* proportion of the profits of the business down to the date of his death. The Defendant had paid £40 to the Plaintiffs for the purchase of *Cox's* interest in the fixture and fittings of the offices of the partnership, and had made them some other payments.

The Defendant alleged that he was not bound by the deed of the 27th of March, 1855, and that, if he was, the provisions of clause 19 did not apply to the partnership which had been carried on after the expiration of the fifteen years.

North, Q.C., and *Hatfield Green*, for the Plaintiffs:—

Though the Defendant was an infant when he signed the memorandum expressing his approval of the articles, and could not, therefore, be bound by them by virtue of that signature alone, yet his signature shews that he had notice of their provisions, and his subsequent acts, after he came of age, were such as to bind him.

The 19th clause was applicable to the partnership at will which was carried on after the expiration of the fifteen years, and it,

therefore, as is said in *Lindley* on Partnership (1), "continued to regulate the rights and obligations of the partners *inter se*": *King* v. *Chuck* (2); *Essex* v. *Essex* (3); *Clark* v. *Leach* (4). *Cookson* v. *Cookson* (5) is distinguishable, or, if not, it is inconsistent with *Essex* v. *Essex*. A provision for ascertaining the partners' shares in the goodwill of the business on the death of either is certainly one which might be expected to be made in reference to a partnership at will.

[FRY, J., referred to *Steuart* v. *Gladstone* (6).]

The Plaintiffs are also entitled, in addition to the £1500, to be paid their testator's share of the capital of the partnership.

Cookson, Q.C., and *Hornell*, for the Defendant:—

It is for the Plaintiffs to make out their case. It is not shewn that the Defendant was ever bound by the articles, and, if he was, there is no evidence of any special agreement that clause 19 should apply to the partnership at will. In the absence of special contract there is no goodwill attaching to the business of a solicitor: *Austen* v. *Boys* (7). The 19th clause is a special condition, and as Lord *Westbury* said in *Clark* v. *Leach* (8), it would be "a strong and extravagant assumption, and one that is not warranted by any principle or authority," to assume that "all the special articles and conditions in the original written deed of partnership for a term are at once transferred by law to this new contract, which has no particular limit to the term of its duration." The proposition, as stated by Mr. Justice *Lindley* (9), is stated too widely. He says that "the expression, 'the partnership term,' seems to be equivalent to the time during which the partners continue in partnership without coming to any fresh agreement." That is too wide, if it is meant that all the terms of the articles are imported into the partnership carried on after the expiration of the term fixed by the articles. *King* v. *Chuck* was the case of a trade partnership, and is not a general authority. It depended

(1) 4th Ed. vol. ii. p. 823.
(2) 17 Beav. 325.
(3) 20 Beav. 442.
(4) 32 Beav. 14; 1 D. J. & S. 409.
(5) 8 Sim. 529.
(6) 10 Ch. D. 626.
(7) 2 De G. & J. 626, 635.
(8) 1 D. J. & S. 414.
(9) 4th Ed. vol. ii. p. 823.

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on peculiar circumstances. In *Essex* v. *Essex* (1) there was an express parol agreement to continue the business on the old terms. *Cookson* v. *Cookson* (2) is the case most like the present, and it is a strong authority in our favour. It has never been overruled.

[FRY, J.:—In the present case there are provisions in the articles for the payment to each of the partners of his share of the goodwill in the event of his death during the term.]

Clauses 19 and 20 are correlative, but that does not shew that they continue to apply after the expiration of the fifteen years. At any rate, there is nothing in the articles to shew that the deceased partner's representatives are entitled to his share of the capital in addition to the £1500.

North, in reply.

FRY, J., after stating the facts and the provisions of the articles, and deciding that the Defendant was by virtue of his acts bound by them, continued:—

The question, then, is whether clause 19 of the articles applies to the partnership at will which was constituted by mutual consent after the expiration of the term of fifteen years. I conceive that the general statement of the rule in Mr. Justice *Lindley's* book on Partnership (3) is accurate. He says, "If a partnership, originally entered into for a definite time, is continued after the expiration of that time, without any new agreement, the articles under which the partnership was first carried on continue, so far as they are applicable to a partnership at will, to regulate the rights and obligations of the partners *inter se*." The rule is also stated by Sir *Anthony Hart*, Lord Chancellor of *Ireland*, in *Booth* v. *Parks* (4) thus: "We know that after the expiration of the term at first agreed upon, partnerships frequently continue without a new agreement; and the effect of that is, that the partners, after the expiration of the partnership term, continuing to carry on the trade without a new deed, all the old covenants are infused into

(1) 20 Beav. 442.
(2) 8 Sim. 529.
(3) 4th Ed. vol. ii. p. 823.
(4) 1 Moll. 465.

the new series of transactions; with the single exception of the covenant for duration, for either may *instanter* dissolve the prolonged partnership; but all the other original stipulations are continued." In my view that is not so accurate a statement of the rule as is that of Mr. Justice *Lindley*. The exception, I think, does not apply only to the covenant for duration, but to every stipulation in the original deed which is inconsistent with the new partnership at will. Obviously there may be many provisions not consistent with such a partnership, and all those, and those only, which are consistent will apply. Is this 19th clause consistent or inconsistent with a partnership at will? In my judgment it is quite consistent, and I therefore hold that the partners continued bound by it. No doubt, the case of *Cookson* v. *Cookson* (1) is, to some extent, at variance with this conclusion. But, in my view, that case is not consistent with *Essex* v. *Essex* (2), and, if I must judge between the two, I prefer the latter. Moreover, the present case differs from *Cookson* v. *Cookson* because there are mutual provisions for what is to be done in the event of the death of either of the other two partners during the term. The provision is so convenient, so congruous to a partnership at will, that I can see no reason why it should not apply to it. I hold, therefore, that the £1500 must be paid to the Plaintiffs.

Then arises the question whether the £1500 is to include the testator's share in the capital of the business. The articles are not very clear, but I think on the whole that the £1500 was intended to include the share of the capital. The word "goodwill" is a very elastic term, and I think that in the 19th clause it was intended to include the share of capital contributed by *Cox*, and that the clause was intended to provide for all the payments that were to be made to the executors of *Cox*. It is precise as to the time and mode of payment, and I think it highly improbable that the deed should have been silent as to the payment of eight-twentieths of the capital if it had been intended that that should be paid over and above the £1500. It does expressly provide for the payment of £40 for the purchase-money for the interest of *Cox* in the fixtures and fittings. I cannot refuse to give interest on the balance of the £1500 which remains unpaid. But as a large

(1) 8 Sim. 529. (2) 20 Beav. 442.

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part of it was paid sooner than it need have been, and no demand was made for payment until the 25th of March, 1878, I shall allow interest only from that date. Both parties have claimed too much, and therefore I shall give no costs.

Solicitor for Plaintiffs: *G. W. Barnard.*
Solicitors for Defendant: *Willoughby & Cox.*

FRY, J.
1880
Feb. 24, 25.

LUCAS *v.* COOKE.

[1879 L. 211.]

Copyright—Painting—Engraving—Limited Assignment—Infringement—Onus of Proof—5 & 6 Vict. c. 45, s. 11—25 & 26 Vict. c. 68, s. 1.

When the owner of the copyright of a painting assigns the copyright for the purpose of producing an engraving of one size, the right of producing copies of the painting in other ways, or by engravings of other sizes, remains in him, and can be assigned by him to any other person.

And, if the assignee of the right of copying a painting in a particular way alleges that some other publication is an infringement of his copyright, the *onus* is on him to shew that that publication has been taken from his copy and not from the original painting.

Registration of the proprietorship of the copyright of a painting is only *primâ facie* evidence of title, and may be rebutted by the terms of the assignment of the copyright to the person who has made the registration.

THIS action was brought to restrain an alleged infringement by the Defendant of a copyright which the Plaintiff claimed in an oil painting, called "*Going to Work,*" and in an engraving taken from it.

The Plaintiff was an art publisher, carrying on business in *London.*

The painting in question was painted by Mr. *E. U. Eddis,* a well-known artist, and was sold by him without any reservation to Mr. *A. D. Halford,* who thus became, by virtue of the Act 25 & 26 Vict. c. 68, the sole proprietor of the copyright of the painting. The painting was exhibited at the *Royal Academy* in 1870.

On the 9th of November, 1870, Mr. *Halford* signed the following memorandum addressed to the Plaintiff:—

"I assign to you, for the purpose of producing an engraving of

one size, the copyright of the picture painted by Mr. *E. U. Eddis*, entitled '*Going to Work*,' and being a portrait of my daughter."

On the 12th of November, 1870, the Plaintiff caused himself to be registered at *Stationers' Hall*, under the provisions of the Act, as the proprietor of the copyright of the painting. He employed an engraver to make for him a steel mezzotinto print or engraving from the painting, and on the 4th of July, 1871, he published the engraving. The Plaintiff's name and the date of the first publishing of the engraving were printed on every copy which he published, in compliance with the provisions of the Act 8 Geo. 2, c. 13, and the subsequent Acts amending and extending that Act (commonly known as the *Hogarth* Acts).

The painting represented a young girl with bare feet, walking on the sea-shore, with a child's spade in one of her hands, resting across her shoulder, and a child's bucket in her other hand.

The Defendant was a printer at *Leeds*, and he carried on a large business as a printer of fancy almanacks, embellished with chromo-lithographs, which he sold to grocers and other tradesmen in many parts of *England* for the purpose of their giving them away to their customers at Christmas. In course of the year 1879 the Defendant prepared one of his fancy almanacks for the year 1880, and on it was printed a chromo-lithograph, called "*Holiday Time*," which the Plaintiff alleged to be an infringement of his copyright in Mr. *Eddis's* painting and the engraving from it. This chromo-lithograph represented a young girl, with bare feet, standing (not walking) on the sea-shore, with a child's spade in one of her hands resting across her shoulder, and a child's bucket in the other hand. The face and figure, however, differed from those of the girl in the painting, and the dress was also different.

The Plaintiff claimed an injunction to restrain the Defendant from copying the painting or the engraving; the payment of damages and penalties; and other relief.

By his statement of defence the Defendant denied that the Plaintiff was the proprietor of the copyright of the painting, and said that, save so far as the copyright was affected by the granting to the Plaintiff by the memorandum of the 9th of November, 1870, of a license to produce an engraving of one size, Mr. *Halford* was the sole proprietor of the copyright of the

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painting. The Defendant also denied that his chromo-lithograph was copied or imitated from the painting, or the engraving or the design thereof.

By the evidence given at the trial by the Defendant, and by Mr. *Otto Riehmer*, the artist whom he had employed to produce the chromo-lithograph, it appeared that the chromo-lithograph was copied from a photograph, published in *New York*, by a well-known photographer named *Mora*. *Riehmer* had purchased a copy of the photograph in *London*, and had suggested it to the Defendant as a suitable subject for his almanack. In the photograph there was a background of mountain scenery, but, at the Defendant's suggestion, this was altered in the chromo-lithograph, and the sea-shore was introduced instead, as being more appropriate to the representation of a girl with bare feet carrying a spade and a bucket. The Defendant and *Riehmer* both swore positively that, before the production of the chromo-lithograph, they had not seen or heard of either the painting or the Plaintiff's engraving. There was no evidence as to the circumstances under which *Mora's* photograph had been produced.

In the opinion of the Court it was evident from a mere inspection of the photograph that it was a portrait of a girl taken from life, and some of the witnesses expressed the same opinion.

The Plaintiff adduced no direct evidence to prove that either the chromo-lithograph or the photograph had been copied or imitated from either the painting or the engraving.

Locock Webb, Q.C., *R. W. Ingham*, and *Bowen May*, for the Plaintiff:—

The assignment of the 9th of November, 1870, gave the Plaintiff the copyright of the picture as well as that of the engraving. Prior to the passing of the Act 25 & 26 Vict. c. 68, there was no copyright in a painting, and *Turner* v. *Robinson* (1) shews what the rights of the owner of a painting were at Common Law. Before publication of the painting, the owner had a right to prevent any person from copying it, but after publication the right was lost. The copyright in engravings is governed by the Acts 8 Geo. 2, c. 13; 7 Geo. 3, c. 38; 17 Geo. 3, c. 57; and 6 & 7 Will. 4, c. 59,

(1) 10 Ir. Ch. Rep. 121.

commonly known as the *Hogarth* Acts, and the protection is extended to lithographs by the Act 15 & 16 Vict. c. 12. The Act 25 & 26 Vict. c. 68, extends to the owners of paintings the benefit of the provisions of the *Copyright Act*, 5 & 6 Vict. c. 45. The effect of sect. 11 of the latter Act is to give the person who is registered as the proprietor of the copyright of a painting a good title as against all the world—at any rate as against everyone but the real owner. The Plaintiff, therefore, has a good title to the copyright of the painting in this case, at any rate as against everyone except Mr. *Halford*, who is not a party to the action.

[FRY, J.:—Sect. 11 only makes the register *primâ facie* evidence of title. Registration does not give you anything more than your agreement gives you.]

At any rate registration is *primâ facie* evidence of title, and the Defendant must rebut it. The Defendant's chromo-lithograph is clearly an invasion of the Plaintiff's right. The main idea of the two is the same. The Defendant's is a copy of the Plaintiff's within the meaning of the Act; there are only small variations. And it is not necessary to prove knowledge on the part of the Defendant: *West* v. *Francis* (1). A photograph of an engraving is a piracy: *Gambart* v. *Ball* (2); *Graves* v. *Ashford* (3). So is a picture worked in wool: *Dicks* v. *Brooks* (before Vice-Chancellor *Bacon*, May 30, 1879). In *Singer Machine Manufacturers* v. *Wilson* (4), Lord *Cairns* said (5) that "fraud is not necessary to be averred or proved in order to obtain protection for a trade-mark. . . . The action of the Court must depend upon the right of the Plaintiff, and the injury done to that right." The same principle applies to copyright.

Eddis, Q.C., and *Leonard Field*, for the Defendant:—

The Copyright Acts are all of a penal nature, and they tend to a monopoly; they must therefore be construed strictly. The letter of the 9th of November, 1870, is either a limited assignment of the copyright of the picture for a specific purpose, or it is a license to copy. Whatever is not assigned remains in the

(1) 5 B. & A. 737.
(2) 14 C. B. (N.S.) 306.
(3) Law Rep. 2 C. P. 410.
(4) 3 App. Cas. 376.
(5) 3 App. Cas. 391.

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assignor, or the whole remains in him, subject to the license. The right given to the Plaintiff is to produce an engraving of one size; there remained in the assignor the right to copy the picture by an engraving of any other size, or by any other means, such as a lithograph or a chromo-lithograph, and he could assign that right to any other person. The copyright given by sect. 1 of the Act 25 & 26 Vict. c. 68, is "the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof . . . . by any means and of any size." The engraver obtains a copyright in the engraving and in nothing else, unless he acquires also the copyright of the picture. Supposing that the Defendant has copied his production from either the painting or the Plaintiff's engraving, there is no evidence to shew from which he has copied it, and he is entitled, so far as the Plaintiff is concerned, to copy from the picture: *De Berenger* v. *Wheble* (1). Mr. *Halford* is not complaining. The *New York* photograph may have been suggested by the painting. If the view expressed by Mr. Justice *Bayley* in *West* v. *Francis* (2), that "a copy is that which comes so near to the original as to give every person seeing it the idea created by the original," be right, the most limited assignment of a copyright would convey everything that the assignor had. The mere fact that the same idea is conveyed cannot be the true test. The Plaintiff is bound to shew that the Defendant has copied from his engraving. But there are in fact so many important differences between the Defendant's picture and the Plaintiff's engraving that the one cannot be said to be a copy of the other. At any rate, to justify the infliction of penalties, it must be shewn that the Defendant has wilfully copied the Plaintiff's engraving.

Locock Webb, in reply.

FRY, J., after referring to the terms of the assignment of the the 9th of November, 1870, continued:—

It is material to inquire what is the effect of that instrument. Before he signed it Mr. *Halford* was unquestionably entitled to produce himself and to permit the production of copies of the

(1) 2 Stark. N. P. C. 548. (2) 5 B. & A. 737, 743.

painting in any manner and of any size. By this instrument he assigned the copyright of the painting for the purpose of producing an engraving of one size. The Plaintiff says that, notwithstanding those words limiting the effect of the assignment, it was an absolute assignment of the whole copyright of the painting, and that, although it is expressed to be granted to him for the purpose of producing an engraving of one size, he is entitled to produce engravings of any size, and that he is at liberty to copy the painting in any other manner than by engraving, and, further than that, he really claims to be entitled to restrain even Mr. *Halford* or his friends from copying his own painting hanging on his own wall.

In my view, that is certainly not the true construction of the document. I consider that it is either an assignment by, or a license from, Mr. *Halford* for the purpose of enabling Mr. *Lucas* to copy the painting and to publish an engraving of it of one size. Of that engraving when completed, and of the copyright of it, Mr. *Lucas* was and is now the owner, and that is all which is assigned to him. If I did not come to that conclusion I should be compelled to reject and render null the plain words of the assignment. Those words are clear, and I must give full effect to them.

But on behalf of the Plaintiff it is said that, although the instrument may not convey the absolute copyright of the painting to him, yet from the moment of the registration effected by him at *Stationers' Hall* on the 12th of November, 1870, which purported to be a registration of the copyright in the painting itself, it conveyed to him, as against all the world except Mr. *Halford*, the absolute copyright in the painting. That appears to me to be an entirely erroneous conclusion. Sect. 11 of the Act 5 & 6 Vict. c. 45, says that a certified copy of the registration shall be received as evidence in all Courts, and "shall be *primâ facie* proof of the proprietorship, or assignment of copyright, or license, as therein expressed, but subject to be rebutted by other evidence." Now in the present case the Plaintiff produces one document in evidence of his title, namely, the assignment to him by Mr. *Halford*, under which it is impossible that he can have the whole copyright of the painting, and which rebuts the *primâ facie* evidence of title arising from the registration. That argument, therefore, entirely fails.

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The result of this instrument, in my view of it, was this, that after the preparation of the engraving and the registration, Mr. *Lucas* became the owner of the copyright of the print or engraving, and Mr. *Halford* remained the owner of the copyright of the painting. Each of them was at liberty at his pleasure to copy from and publish copies of that which he possessed, and neither of them could restrain the publication by the other of a copy of that which was in his possession and was his property. Mr. *Lucas*, therefore, ran the risk of Mr. *Halford's* publishing copies of the painting which was in his possession, if he thought fit, certainly not a very great risk considering his position in society and the character of the painting, which was a portrait of his own daughter.

What happened then was this:—[His Lordship referred to the circumstances under which the chromo-lithograph was produced by the Defendant, and to the evidence of the Defendant and *Riehmer*, and continued:—] I see no reason whatever to doubt the statements of Mr. *Riehmer* or Mr. *Cooke*, from which it appears that the coincidence between the Plaintiff's engraving and the Defendant's chromo-lithograph, so far as the Defendant is concerned, was really the result of his suggestion that the sea-shore should be substituted for the original background of the photograph. It appears to me, therefore, clear that the chromo-lithograph was honestly produced from the photograph. There is nothing to lead me to disbelieve the statements of Mr. *Cooke* and Mr. *Riehmer* that, before they had produced the chromo-lithograph, neither of them had seen either Mr. *Halford's* painting, or the Plaintiff's engraving of it.

Then it is said that the photograph from which the chromo-lithograph is mainly taken is a copy of the painting and also of the engraving, and that the design of the chromo-lithograph is in substance the same as that of the engraving. That the photograph is to some extent a copy, seems to me, from a comparison of the two, very probable, so far as the design is concerned. There are a number of points of resemblance which I think render it very probable that the design of the one originated the design of the other, that they had in fact one common source. But I must bear in mind that there is no evidence to shew what was the

origin of the photograph. I am therefore left entirely to inference. And I must bear in mind two other things before I can judicially conclude that the one is necessarily a copy of the other.

In the first place, a little girl without shoes and stockings, with a spade over her shoulder and holding a pail in her hand, is one of the commonest objects of the sea-shore, as is well known to everybody; and the attitude assumed by a child in such circumstances would be likely to attract the attention of artists. I must also bear in mind the fertility of the human mind in the production of designs. We constantly in life meet with coincidences which suggest a common origin, but which, when investigated and examined, are found to be nothing but coincidences. Experience shews that it is not merely probable, but certain, that improbable events will happen.

Bearing all these things in mind, I think I cannot safely come to the conclusion that the photograph was copied either from the painting or from the engraving. I repeat that the inference that the one was derived from the other is very strong, but yet it is not of such a character that I ought to act upon it. The Plaintiff might have investigated the origin of the photograph and traced it home, and if that had been done it might have had an important effect upon the result of this case. The case, however, has been put before me simply on the similarity of the two things.

But, even if I am wrong in this view, and if I assume it to be clearly proved that the photograph came from the design or idea originally in the mind of the artist, yet it must be borne in mind that that idea had two embodiments or two expressions, the one in the painting and the other in Mr. *Lucas's* engraving. There is no evidence before me to shew from which of the two the photograph was derived. For anything I know, the photographic artist may have seen the painting at the *Royal Academy*, and, on his return to *New York*, may have placed a little girl in his studio in the position of the girl in the painting, and have taken a photograph of her with the requisite background, and in that manner may have reproduced to a great extent the painting which he had seen. There would be no difficulty in doing that, but it would be reproducing the painting, not the print or engraving. In that case

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the copyright, if any, infringed would be that of Mr. *Halford* and not that of Mr. *Lucas*. (I ought to have said that I am satisfied that the photograph was taken from nature, from a living girl, and not from any picture.) That being so, and the Plaintiff having only a right of action with respect to the engraving, his case, in my judgment, entirely fails. Before he could sustain his claim to the relief he seeks, it would be necessary for him to prove that the photograph which Mr. *Riehmer* bought was a copy of the engraving, and that he has failed to do.

I must therefore give judgment for the Defendant, with costs.

Solicitor for Plaintiff: *J Bowen May.*
Solicitor for Defendant: *Edward Pope.*

Ex parte WHITTON. *In re* GREAVES.

C. J. B.
1880
Feb. 25.

Practice—Time of Appealing to Chief Judge from County Court—Twenty-one Days from "Decision or Order"—Bankruptcy Rules, 1870, *r.* 143.

The twenty-one days within which an appeal from a County Court to the Chief Judge must be brought, are to be reckoned from the day when the decision of the County Court was pronounced.

Ex parte Hookey (1) followed.

THIS was an appeal from a decision of the County Court at *Sheffield.*

Hemming, Q.C., and *West*, for the Appellant.

For the Respondent a preliminary objection was taken, that the Appellant was out of time.

The order appealed from was pronounced by the County Court Judge on the 30th of October, 1879, and was dated on that day, but was not actually settled and signed until the 8th of December, 1879.

The Registrar having refused to set down an appeal on the 9th of December, 1879, and the Chief Judge having declined to direct him to do so, an order was obtained from the Court of Appeal in the terms mentioned in the notice next stated.

A notice that, pursuant to special leave on the 19th of December, 1879, given by the Lords Justices, the Court of the Chief Judge would be moved on the 19th of January, 1880, or as soon after as counsel could be heard on behalf of the Appellant that so much of the order dated the 30th of October, 1879, though only signed and sealed on the 8th of December instant, whereby it was ordered that, &c. (stating the particulars), might be reversed and rescinded, or varied—was on the same 19th of December, 1879, served on the Respondent; the Lords Justices expressly declaring that the question of whether the appeal was or was not in time was left open for decision by the Chief Judge.

De Gex, Q.C., and *Robson*, for the Respondent:—

The question turns upon the construction of rule 143 of the

(1) 4 D. F. & J. 456.

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Bankruptcy Rules, 1870. The Court of Bankruptcy is not within the provisions of the *Judicature Act.* Then what is there to prevent the application of the long line of authorities which decide that the time for appealing begins to run from the date of the decision? *Ex parte Hookey* (1) was a reasoned judgment by Lord *Westbury*, in which the grounds for holding that the twenty-one days begin from the day when the decision of the Court is given, are fully and elaborately stated. This was followed by *Ex parte Dudley and West Bromwich Banking Company* (2), and by your Lordship's decision in *Ex parte Hinton* (3), which, when closely examined, does not conflict with the above rulings. The words "decision" and "order" in rule 143, do, as your Lordship held, mean the same thing, and the Registrar in *Ex parte Cochrane* (4) was in error in dating the order on a different day from that of the decision. If the Registrar in *Ex parte Cochrane* had dated the order of the day of the decision, instead of dating it of the day of settling and signing, your Lordship's decision would not have been adverse to our contention.

Ex parte Cochrane and *Ex parte Garrard* (5) plainly have no application.

Hemming, Q.C., and *West*, for the Appellant:—

Ex parte Hookey was a decision under the Act of 1861, and turned upon the special wording of sect. 12 of the *Bankrupt Law Consolidation Act*, 1849, which speaks of "the date of any decision or order." Here the words are "a decision or order." It often happens, as in the present case, that after a decision has been delivered, a number of suggestions are made on either side, and have to be considered before the order is drawn up, so that, if the Respondent's contention should prevail, the Appellant might not know how to frame his appeal motion, and in fact could not do so because he is required to state the effect of the order appealed from. If the Registrar should fail to settle and sign the order in time, the Appellant may be deprived altogether of his right to appeal.

(1) 4 D. F. & J. 456.
(2) 3 D. J. & S. 456.
(3) Law Rep. 19 Eq. 266.
(4) 9 Ch. D. 698.
(5) 5 Ch. D. 61.

In *Ex parte Cochrane* (1) the Registrar put into the order the date of the signing and settling, and your Lordship held that he was right, and it governs the present case. In this case the Registrar insisted upon putting in the date of the decision, which was wrong, and his error ought not to deprive us of our appeal. *Ex parte Hinton* (2) no doubt turned upon a mistake of the Registrar.

There is no other rational construction to be put on the words "decision or order" than this: that if the order is not settled and signed till afterwards, then it must be dated of the day of the settling and signing, the twenty-one days in either case running from the date of the order. This reconciles all the cases.

BACON, C.J.:—

In my opinion this point is entirely governed by the settled practice of the Court of Bankruptcy, and is not in any way affected by the recent orders under the *Judicature Act*. The judgment delivered by Lord *Westbury* in *Ex parte Hookey* (3) relates not only to the practice of the Court of Bankruptcy, but to the principles which govern that practice, and the reasons for the rule under discussion are fully stated in that judgment. When the Court has performed its judicial function, and has pronounced its decision, twenty-one days are given within which an appeal may be brought. If I were to hold that the twenty-one days are to be reckoned from any other period than the date of the decision, I should be introducing a new practice, and opening the door to continual inconvenience. There is no reason why an appellant should wait until the order of the Court has been drawn up. He may appeal, if not from the actual words of the order itself, from the meaning and substance of it. If I were to allow solicitors or any one else to prolong this period of twenty-one days, within which an appeal may be brought, I should be introducing a most pernicious practice, and one which has never obtained in the Court of Bankruptcy.

In the present instance it is clearly left within my option to allow this Appellant to enter his appeal. From what has been stated to me, it is impossible to mistake what took place, on this

(1) 9 Ch. D. 698. (2) Law Rep. 19 Eq. 266.
(3) 4 D. F. & J. 456.

C. J. B. 1880 *Ex parte* WHITTON. *In re* GREAVES.

application, before the Lords Justices. What the Lords Justices said seems not to have depended on any view expressed by them as to the rules of the Court of Bankruptcy or of any other Court. They did not intend to say, and did not say, one word to influence the decision of this Court upon the objection which has been taken here. The Lords Justices thought it right that the question should be submitted to this Court as to whether this Appellant has a right to have his appeal entered or not, and, finding that the rule states that an appeal shall be entered "within and not later than twenty-one days from the decision or order," I hold myself bound by the express judgment of Lord *Westbury*, sitting as a Judge in Bankruptcy, on the point before me. The words then in use were, "if no such appeal shall be entered within twenty-one days from the date of any decision or order of the Court." The words in the present orders are equivalent, and I have to consider what was the meaning of the framers of the Rules in using those words. I cannot possibly overrule, nor am I at liberty to disregard, as it certainly is not my inclination to do, the express ruling of Lord *Westbury*.

I hold that I have no more power to hear an appeal in bankruptcy brought in December against a decision pronounced in October, than I have to try a case of horse-stealing, or any other case not within the jurisdiction of this Court.

The appeal must be dismissed with costs.

Solicitors: *Henry A. Maude*, agent for *Webster & Styring, Sheffield; Pattison, Wigg, & Co.*, agents for *Broomhead, Wightman, & Moore, Sheffield.*

In re TOLEMAN AND ENGLAND. *Ex parte* BRAMBLE.

C. J. B.
1880
March 1.

Solicitor's Lien—Production—Bankruptcy Act, 1869, *s.* 96—*Bankruptcy Rules*, 1870, *r.* 110.

A solicitor is not, on the ground of his lien on documents of a bankrupt in respect of professional services before the bankruptcy, entitled to refuse to produce such documents for examination by the trustee.

THIS was an appeal from an order of the *Bristol* County Court, directing the Appellant *Bramble* to produce and shew to the trustee in liquidation, or his solicitor, the partnership deed between the liquidating debtors, and to allow the trustee or his solicitor to examine the same.

In 1877 the Appellant prepared, under instructions from them, a deed of partnership between *Toleman* and *England*, the liquidating debtors, and, as their solicitor, retained in his possession the deed after it had been executed.

In October, 1879, *Toleman* and *England* filed a petition in the *Bristol* County Court for liquidation by arrangement, and a trustee was appointed. The Appellant was not employed by the debtors or the trustee as their solicitor in the liquidation, and at the time of filing the petition a sum of £9 4*s.* 10*d.* was owing to the Appellant for professional charges subsequent to the preparation of the deed. The trustee had by letter applied to the Appellant for the deed of partnership, in answer to which the Appellant expressed his willingness to hand over the deed on payment of his bill of costs, for the amount of which he claimed a lien on all the debtors' papers in his possession.

The trustee thereupon issued a summons under the *Bankruptcy Act*, 1869, s. 96, requiring *Bramble* to attend for examination as a witness, and to produce the partnership deed.

On attending at the County Court, *Bramble* insisted upon his right to refuse production unless his lien was first discharged.

The County Court Judge having held that *Bramble* was not

C. J. B. 1880 *In re* TOLEMAN AND ENGLAND. *Ex parte* BRAMBLE.

entitled to withhold production of the deed from the trustee, *Bramble* now appealed.

F. O. Crump, for the Appellant :—

According to the general rule, a solicitor who has been discharged by his client will not be ordered to produce or deliver up to the client papers on which he claims a lien for costs, even though the client may be embarrassed in prosecuting or defending his claims by the want of such papers: *In re Faithfull* (1); *Hope* v. *Liddell* (2). The lien of a solicitor on the books of his clients deposited with him before their bankruptcy has been expressly recognised: *In re Leah* (3); *Lockett* v. *Cary* (4); and in respect of this lien the trustee in bankruptcy stands in no better position than the bankrupt himself would have done: *Lambert* v. *Buckmaster* (5). By rule 110 of the Bankruptcy Rules, 1870, only the books of account of the bankrupt are excepted from the lien, as without them it would be impossible to ascertain what the bankrupt's estate consisted of; and the *Bankruptcy Act*, 1869, s. 96, recognises the existence of a "lawful impediment" to production of documents relating to the bankrupt, his dealings or property. By even merely producing the documents for examination a solicitor would lose all benefit of his lien.

Finlay Knight, for the trustee, was not called upon.

BACON, C.J. :—

I have listened to an argument in support of the lien of a solicitor, which is not disputed by any one. The question is not whether the solicitor is entitled to a lien, but whether he is bound to produce for inspection by the trustee, to enable him, as an officer of the Court, to administer the bankrupt's estate, documents of the bankrupt which are in his possession from having been the bankrupt's solicitor. The solicitor is, no doubt, entitled to his lien, and the objection would have been valid if it had been

(1) Law Rep. 6 Eq. 325.
(2) 24 L. J. (Ch.) 691.
(3) 6 Jur. (N.S.) 387.
(4) 10 Jur. (N.S.) 144.
(5) 2 B. & C. 616.

sought to take this deed out of his possession. But inspection, and not delivery up of the deed, is what is wanted. The cases cited have no application. The order asked for by the trustee is a matter of common every-day practice, and all practitioners ought to know that they cannot withhold papers relating to a bankrupt's estate from the trustee, whose right and duty it is to inspect them. The order must be affirmed, and the appeal dismissed with costs.

Solicitors: *J. Watson; Bedell, Bristol.*

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ADMINISTRATION—*Conversion within a Year—Discretion in Executors—Depreciation of Securities—Shares in unlimited Company—Invalid Sale to Trustee—Profits, whether Capital or Income.*] Where a testator gives an absolute discretion to his executors to postpone the sale and conversion of his estate, they are not bound by the ordinary rule to convert the property within a year, even though some of the property consists of shares in an unlimited company. Nor will they be liable in the absence of *mala fides* for loss arising to the estate from the non-conversion.—The decision of *Bacon*, V.C., affirmed.—A testator gave all his real and personal property, including a business, to his executors on trust to sell and pay the income to his wife for life, and after her death to the Plaintiff, but with full discretion to his executors to postpone the sale of his estate. And he directed that until the sale the net income should be applied in the same way as the income of the proceeds of the sale was to be applied. Shortly after the death of the testator one of the executors purchased the business at a valuation:—*Held*, by *Bacon*, V.C., that the sale must be set aside, and that the executor must account for the profits made since the sale without salary, but with just allowances; and that the amount of the profits must be treated as capital, and that the widow was

ADMINISTRATION—*continued.*
only entitled to the income of it.—On an appeal the case was compromised, and the purchase was confirmed; but the Court expressed an opinion that if the sale had been set aside the widow would have been entitled to the profits as income. *In re* NORRINGTON. BRINDLEY *v.* PARTRIDGE [C. A. 654

2. —— *Debts—Delay by Creditor—Proof after Certificate of Debts—Negligence—Means of Knowledge.*] *M.* was the executor of *J.*, who had been the executor of *A.* A decree having been made for the administration of the estates of *A.* and *J.*, a sum of £496 was found due from the estate of *J.* to that of *A.*, and on further consideration directions were given for raising it out of *J.'s* real estate. The account had been taken on the footing that at *A.'s* death nothing was due to him from *J.* for interest. Before anything further had been done, *M.* found a small book in the handwriting of *J.*, by which he admitted himself to owe to *A.* at *A.'s* death £70 for interest on the principal moneys due from him to *A.* This book contained a reference to a page in a larger account book which had been used in making out the accounts; and this page contained an entry to the same effect. The book had no index, and the page in question was at the end of the book, and separated by a number of blank pages from what went before, so that it had never been observed. *M.* petitioned to have the amount to be raised out of *J.'s* estate increased by allowing this interest. *Fry*, J., refused the application on the ground that at the time when the account was taken *M.* had in his hands the account book which contained materials enabling him to make the claim:—*Held*, on appeal, that the case fell within the ordinary rule, that a creditor may come in as long as there are assets undistributed, and that the additional amount ought to be raised. *In re* METCALFE. HICKS *v.* MAY - - C. A. 236

3. —— *Debts — Dilapidations — Bequest of Leasehold—Cum onere.*] A testator specificially bequeathed certain personal estate upon trusts

ADMINISTRATION—*continued.*

for *H.* and her children after payment thereout of a legacy and of his debts and funeral expenses, and bequeathed his residuary estate to the Plaintiff, whom he appointed his executor. Part of the residuary estate consisted of a leasehold house, held for a term at a rack rent and considerably out of repair. This leasehold being worthless, the Plaintiff, five months after the testator's death, surrendered it to the landlord, who would only accept a surrender on payment of rent for two and a half quarters from the testator's death and a sum for dilapidations. The residuary estate as a whole was valuable:—*Held* (reversing the decision of *Malins*, V.C.), that the Plaintiff was not entitled to have the sums which he had paid to the landlord for dilapidations and for rent subsequent to the testator's death paid out of the specifically bequeathed property as being debts of the testator. HAWKINS *v.* HAWKINS - - - **C. A. 470**

4. —— *Exoneration—Locke King's Act* (17 & 18 *Vict. c.* 113) *and Amendment Act* (30 & 31 *Vict. c.* 69)—*Will—General Direction to pay Debts—Mortgage Debt.*] A testator by his will, dated in 1877, directed his executors "to pay all my just debts, funeral and testamentary expenses, out of my personal estate in exoneration of my real estate":—*Held*, that a debt due from the testator at the time of his death on a mortgage of part of his real estate must be borne primarily by the mortgaged estate. *In re* ROSSITER. ROSSITER *v.* ROSSITER - - - - - - **355**

5. —— *Interest on Debt — Insolvent Estate—Judicature Act*, 1875, *s.* 10.] In an action for the administration of the estate of a person who has died insolvent since the commencement of the *Judicature Act*, 1875, a creditor on the estate whose debt bears interest is not entitled to interest up to the day of payment, but only to the date of the judgment for administration, which, by virtue of the 10th section of the Act, is equivalent to an adjudication in bankruptcy. *In re* SUMMERS. BOSWELL *v.* GURNEY - - - - - **136**

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See VENDOR AND PURCHASER. 1.

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See MINE. 1, 2.

AMENDMENT OF PLEADINGS - - **388**
See PRACTICE. 28.

ANNUITY—Duration of - - - **564**
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—— Separation deed—Proof in bankruptcy **262**
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APPEAL—Evidence - - - - - **652**
See PRACTICE. 1.

—— Liquidation—Costs - - - - **475**
See COMPANY. 5.

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—— Time for appealing - - - **416**
See PRACTICE. 3.

—— Time for appealing—Bankruptcy - **881**
See BANKRUPTCY. 19.

—— Undertaking not to appeal - - **261**
See PRACTICE. 4.

—— Winding-up order - - - **400**
See COMPANY. 4.

—— Withdrawal—Discontinuance of action **469**
See PRACTICE. 2.

APPORTIONMENT — Coal got from adjoining colliery - - - - **277**
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APPROPRIATION OF PAYMENTS - **696**
See BANKER.

ARREST — *Attachment — Defaulting Trustee — Person "acting in a Fiduciary Capacity" — Manager of Testator's Estate—Action for Payment of Money — "Court of Equity" — "High Court of Justice"—Debtors Act*, 1869, *s.* 4, *sub-s.* 3 *—Debtors Act*, 1878, *s.* 1—*Judicature Act*, 1873, *s.* 76.] The *Debtors Act*, 1869, while abolishing the penalty of imprisonment for debt in the case of an honest debtor, is intended for the punishment of a fraudulent or dishonest debtor, and is in that sense vindictive.—*Barrett* v. *Hammond* (10 Ch. D. 285) not followed.—A "person acting in a fiduciary capacity" (*Debtors Act*, 1869, s. 4, sub-s. 3) means a person who stands in a fiduciary relation towards any other person who may be entitled to call upon him to pay, whether such other person is or is not the plaintiff, or one of the plaintiffs, in the action in which the order for payment has been made.—Under sect. 76 of the *Judicature Act*, 1873, the words "the High Court of Justice" should be read in substitution for the words "a Court of Equity" in sect. 4, sub-sect. 3, of the *Debtors Act*, 1869.—A son in the course of management of one of his father's farms sold part of the farming stock, and received the proceeds. Upon the father's death an action was brought by parties interested in his estate against the son for payment of the moneys received by him, and for accounts. The son having failed to comply with an order made in the action for payment of a sum of money into Court:—*Held*, that he was a "person acting in a fiduciary capacity" within sect. 4, sub-sect. 3, of the *Debtors Act*, 1869; and accordingly, the Court not being satisfied that he had not the means of payment, leave was given to the Plaintiffs to issue a writ of attachment against him for non-payment.—The policy and effect of the Debtors Acts, 1869 and 1878, considered. MARRIS *v.* INGRAM - - - - **338**

2. —— *Debtors Act*, 1869—*Form of Order—Attachment—Discretion of Judge.*] A man who makes default in payment of a sum of money which he has been ordered by the Court to pay, cannot be attached for contempt, but must be proceeded against under the *Debtors Act*, s. 5.—But where a Judge made an order for the committal of a defaulting party under the *Debtors Act*, and the order was drawn up by the Registrar in the presence of the debtor in the form of an attachment for contempt, from which the debtor appealed, the Court dismissed the appeal and directed the order to be rectified.—As a general

ARREST—*continued.*
rule, when a Judge has been judicially satisfied of the ability of a debtor to pay the amount in which he has made default, the Court of Appeal will not interfere with his conclusion. ESDAILE *v.* VISSER - - - - C. A. 421

3. —— *Debtors Act — Company — Director—Gratuitous Shares — Fiduciary Capacity.*] A director of a company was ordered, under the 165th section of the *Companies Act*, 1869, to pay the full value of shares received by him from the promoter, upon which no money had been paid:—*Held*, upon motion to commit him to prison for non-payment of the money, that his case was not that of a defaulting trustee within the meaning of the *Debtors Act*, 1869, s. 4, but of a shareholder who had not paid the full amount due from him.—Motion to commit refused. *In re* DIAMOND FUEL COMPANY. METCALFE'S CASE - 815

ARTICLES OF PARTNERSHIP—Continuance of business after expiration of term - 863
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ASSIGNEE IN BANKRUPTCY — Reversionary *chose in action* of bankrupt—Notice 413
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—— Voluntary—Declaration of trust - 822
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ASSIGNS—Omission of, in devise of fee - 774
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BALANCE AT BANKERS—Trust money - 696
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BANKER—*Lien—Following Trust Money—Entry by Banker—Order of Payment—Appropriation—Rule in Clayton's Case—Trustee.*] If money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the bankers' hands.—*Ex parte Dale & Co.* (11 Ch. D. 772) dissented from.—If a person who holds money as a trustee or in a fiduciary character pays it to his account at his bankers, and mixes it with his own money, and afterwards draws out sums by cheques in the ordinary manner:—*Held*, by the Court of Appeal (*dissentiente Thesiger*, L.J.), that the rule in *Clayton's Case* (1 Mer. 572), attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money.—*Pennell* v. *Deffell* (4 D. M. & G. 372) on this point not followed. *Held*, by *Fry*, J., that, as between two *cestuis que trust* whose money the trustee has paid into his own account at his bankers, the rule in *Clayton's Case* applies, so that the first sum paid in will be held to have been first drawn out. *In re* HALLETT'S ESTATE. KNATCHBULL *v.* HALLETT [C. A. 696

BANKRUPTCY—*Act of Bankruptcy—Bill of Sale, Agreement for future—Assignment of Whole of Grantor's Property—Exception of Book Debts.*] Shortly before a trader filed a liquidation petition he executed a bill of sale of substantially the whole of his property, to secure the repayment of an advance which had been made to him two months previously. At the time when the advance was made the borrower agreed to give a bill of sale to secure it; but the agreement was that the bill of sale was not to be signed until the lender "lost confidence" in the borrower:—*Held* (reversing the decision of *Bacon*, C.J.), that this amounted to an agreement to postpone the giving of the bill of sale until the grantor should be on the verge of bankruptcy; and that, consequently, on the principle of *Ex parte Fisher* (Law Rep. 7 Ch. 636), it could not support the deed.—In estimating whether a bill of sale comprises the whole of a trader's property, the value of his book debts is to be taken into account. *Ex parte Foxley* (Law Rep. 3 Ch. 515) explained. *Ex parte* BURTON. *In re* TUNSTALL - - - 102

2. —— *Act of Bankruptcy—Assignment of all Debtor's Property—Exception of Book Debts.*] In estimating whether a bill of sale comprises the whole of a trader's property the value of his book debts is to be taken into account. *Ex parte* FIELD. *In re* MARLOW - - - C. A. 106, n.

3. —— *Act of Bankruptcy — Bill of Sale—Assignment of whole Property to secure pre-existing Debt—Antecedent Agreement to give Bill of Sale "if or when required" by Creditor—Onus probandi.*] When a bill of sale comprising the whole of the grantor's property is given on the eve of his bankruptcy to secure a pre-existing debt, and it is attempted to support it by an agreement alleged to have been made at the time when the money was advanced, it is for the Court to judge from all the surrounding circumstances whether the agreement was a *bonâ fide* one, or whether the giving of the bill of sale was purposely postponed in order to protect the grantor's credit.—The fact that the agreement was to give the bill of sale "if or when required" by the creditor does not of itself necessarily invalidate it.—*Ex parte Fisher* (Law Rep. 7 Ch. 636) explained.—The Court will require a very clear explanation of the delay in the execution of the bill of sale, and the *onus* is on the person who sets up the prior agreement to prove, not only its existence, but its *bona fides*. *Ex parte* KILNER. *In re* BARKER - C. A. 245

4. —— *Adjudication—Withdrawal of Debtor's Notice to dispute Petitioning Creditor's Debt—Right to dispute Debt on hearing of Petition—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 8, 9—*Bankruptcy Rules*, 1870, *rr.* 36, 38.] A debtor against whom a bankruptcy petition had been presented, gave notice, under rule 36 of the Bankruptcy Rules, 1870, of his intention to dispute the petitioning creditor's debt. He afterwards withdrew the notice, but on the hearing of the petition, without having given a fresh notice, he claimed the right to dispute the amount of the debt, on the ground that, since the withdrawal of the notice, he had made a payment to the creditor which reduced the debt below £50.—The creditor was not present, and the Registrar dismissed the

BANKRUPTCY—*continued.*

petition:—*Held*, that the debtor was not precluded from disputing the amount of the debt, but that the creditor ought to have an opportunity of giving evidence to contradict the debtor; and the petition was referred back to the Registrar for this purpose. *Ex parte* Learoyd. *In re* Luttman [C. A. 321

5. —— *Assets—Property of Bankrupt — Defaulter on Stock Exchange—Differences paid by Members of Stock Exchange to Official Assignee—Rights of Defaulter's Trustee in Bankruptcy—Rules of Stock Exchange—Adverse Claims—Payment of Money to wrong Party—Remedy of real Owner.*] By the rules of the *London Stock Exchange*, when a member is declared a defaulter, the contracts for the sale and purchase of stocks and shares, which have been made by him for the next settling or account day, are closed by a person, called the official assignee, appointed by that body, at the market prices of the stocks and shares, the subjects of the contracts, at the time of the default, and those members who, on that footing, owe differences upon their contracts with the defaulter are bound by the rules, on pain of being themselves declared defaulters, to pay those differences to the official assignee. And the official assignee is bound by the rules to employ the moneys thus received by him in the first place in paying to those members, to whom, upon the same footing, differences are due upon their contracts with the defaulter, the differences so due to them.—*Held*, that the moneys thus received by the official assignee, being an artificial fund created by the rules of the *Stock Exchange*, do not form part of the assets of the defaulter, and do not pass to his trustee in bankruptcy.—*Tomkins* v. *Saffery* (3 App. Cas. 213) distinguished.—*Held*, also, that, even if the payments made to the official assignee of a defaulter ought to have been made to the trustee in bankruptcy, yet, as the official assignee claimed them adversely, the trustee could not recover them from him. *Ex parte* Grant. *In re* Plumbly C. A. 667

6. —— *Assets—Partnership—Joint and Separate Estate—Alteration of Estate in Assets—Death of Partner—Authority to Trustees to carry on Business — Business carried on by some only of Trustees—Bankruptcy of New Firm—Right of Old Creditors to Assets of Old Firm remaining in Specie—Order and Disposition.*] A father and son carried on business in partnership, under articles which provided that the machinery employed in the business should not form part of the capital, but should belong to the father. The father died, having by his will appointed his wife, his son, and his son-in-law executors and trustees. He authorized his trustees to continue his business, either alone or in conjunction with any person or persons, and to employ the capital employed in it in carrying it on, and also to employ in it any money, part of his general estate. After his death the widow and the son continued to carry on the business until they became bankrupt. The son-in-law took no part in the business, though he knew that it was being continued:— *Held*, that, as the carrying on of the business by two only of the trustees was not authorized by the will, the machinery was not converted into assets of the new firm, and that consequently the unpaid creditors of the old firm were entitled to such of the machinery as remained in specie at the date of the bankruptcy of the new firm:—*Held*, also, that the creditors of the new firm were not entitled to the machinery on the ground that it had remained in the order and disposition of the new firm with the consent of the creditors of the old firm.—Decision of *Bacon*, C.J., affirmed. *Ex parte* Butcher. *In re* Mellor - - - - C. A. 465

7. —— *Assignee in Bankruptcy — Notice — Assignment of Chose in Action—Notice to Trustee—Bankruptcy Act*, 1849, *s.* 141.] A person entitled to a reversionary share of a trust fund became bankrupt in 1866. The trustees of the fund had no notice of the bankruptcy till 1878. In 1871 the bankrupt assigned his reversionary share for value to a purchaser who had no notice of the bankruptcy and who gave immediate notice of the assignment to the trustees of the fund. The reversion fell into possession in 1878:—*Held*, by the Court of Appeal, that under the terms of the *Bankruptcy Act*, 1849, s. 141, the title of the assignee in bankruptcy must prevail against that of the particular assignee.—*Re Coombe's Trusts* (1 Giff. 91) approved. *In re* Bright's Settlement - - - - - C. A. 413

8. —— *Debtor's Summons—Bonâ fide Dispute as to Debt — Solvent Debtor — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 7.] The process of debtor's summons was not intended to be used where there is a solvent debtor and a *bonâ fide* dispute as to the debt.—If there is really no defence to the claim, the creditor ought to proceed by a specially indorsed writ under the *Judicature Act*. *Ex parte* Sewell. *In re* Sewell C. A. 266

9. —— *Jurisdiction—Impeachment of Deed on Ground of Intention to defeat Creditors—Time for taking Objection—Bankruptcy Act*, 1869, *s.* 72.] A mortgage given by a bankrupt more than twelve months prior to the bankruptcy was impeached by the trustee in the bankruptcy on the ground of its having been executed with intent to defeat creditors. Trial of issues was ordered by a County Court in an action in which the trustee was Plaintiff, and the mortgagee Defendant; and the jury found for the Plaintiff.—The Registrar of the County Court having made an order in the bankruptcy that the instruments be delivered up to be cancelled:—*Held*, on appeal, that the trustee had no right to have the question tried in bankruptcy, and that the whole proceeding had been irregular.—Appeal allowed, but, as it did not appear that objection to the jurisdiction was taken in the Court below, without costs. *Ex parte* Harrison. *In re* Harrison - - - - - 603

10. —— *Liquidation by Arrangement—Discharge of Debtor — Debt incurred by means of Fraud—Right of Creditor to sue—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 13, 49, 125 (*sub-s.* 10)—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 15—*Bankruptcy Rules*, 1870, *rr.* 260, 289.] After a liquidating debtor has obtained his discharge, a creditor, whose debt has been incurred by means of fraud, is entitled to sue the debtor at law for the amount of the debt, notwithstanding that the liquidation is not closed, and that he has proved the debt in the liquidation.—The Court of

Bankruptcy will not, in such a case, restrain the action.—If the creditor has received any dividends in the liquidation, the debtor will only remain liable for the unpaid balance of the debt; and, if no dividends have been paid, the debtor, if he pays the creditor in full, is entitled to stand in his place in respect of any dividend which may be declared on the debt in the liquidation.—Whether sect. 15 of the *Debtors Act*, 1869, applies to a liquidation by arrangement, *quære*. *Ex parte* Hemming. *In re* Chatterton - C. A. 163

11. —— *Liquidation Petition—General Meeting of Creditors—Voting—Proxy—Creditor present but not desiring to Vote—Removal of Trustee—Vote by Creditor who has sold his Debt—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 16, *sub-ss.* 6, 7, 8; *s.* 80, *sub-s.* 8—*Bankruptcy Rules*, 1870, *rr.* 85, 86, 269, 271, 273, 293, 304, 305, 307.] A creditor who is present at a general meeting of creditors under a liquidation petition, cannot be considered as present on behalf of another creditor for whom he holds a proxy, notwithstanding the fact that the proxy is on the file of proceedings, unless he has done some act to shew that he intends to be present on that occasion on behalf of his principal as well as on his own behalf.—*Ex parte Orde* (Law Rep. 6 Ch. 881) distinguished.—Whether the principle of that decision applies to any meeting of creditors held after the registration of liquidation or composition resolutions, *quære*.—The appointment of a proxy under the *Bankruptcy Act* and Rules only confers on the person so appointed an authority to represent his principal; it does not necessarily follow that he in fact represents his principal on all subsequent occasions when he is present at a meeting, unless he would have no right to be present in any other capacity.—The fact that a creditor who has signed a notice summoning a general meeting for the purpose of removing the trustee, and who has voted at the meeting in favour of a resolution for removing the trustee, had previously sold his debt to another creditor, will not invalidate the notice or the resolution. *Ex parte* Evans. *In re* Baum [C. A. 424

12. —— *Liquidation Petition — Creditors' Meeting—Voting—Blank Proxy sent by Creditor to Debtor's Solicitor—Implied Authority to insert Name of Debtor's Solicitor—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 80, *sub-s.* 8—*Bankruptcy Rules*, 1870, *r.* 85—*Bankruptcy Forms*, 1870, *Nos.* 32, 33.] A creditor of a liquidating debtor, who signs a proxy in blank and sends it to his solicitor, who forwards it to the debtor's solicitor without any express instructions as to the use to be made of it, thereby confers on him an implied authority to fill up the proxy with his own name and to vote on his behalf. *Ex parte* Duce. *In re* Whitehouse - - - - C. A. 429

13. —— *Liquidation Petition — Meeting of Creditors—Proof—Voting—Contingent or unascertained Debt—Annuity under Separation Deed—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 16 (*sub-s.* 3), 31, 125 (*sub-s.* 2).] A debtor who filed a liquidation petition had, by a separation deed between himself and his wife, covenanted to pay to a trustee an annuity, during the joint lives of himself and his wife, for the maintenance of the wife and child of the marriage. The annuity was to cease in case the husband and wife should cohabit again:—*Held*, that, the value of the annuity not having been ascertained, the trustee was not entitled to vote in respect of it at a meeting of creditors under the petition. *Ex parte* Pearce. *In re* Grieves - - C. A. 262

14. —— *Liquidation Petition—Registration of Resolutions—Statement of Affairs—Small Amount of Assets—Bona fides of Creditors—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Rules*, 1870, *rr.* 295, 301.] Registration of the resolutions passed by the creditors under a liquidation petition having been refused, leave was given to the debtor, a trader, to summon a fresh first meeting of the creditors. The fresh meeting was held more than two months after the original meeting, but the debtor produced the same statement of his affairs as he had produced at the original meeting:—*Held*, that, there being no evidence that the state of the debtor's affairs had changed in the interval, it could not be taken that the statement was necessarily inaccurate.—The creditors of a debtor, whose statement of affairs shewed that his debts amounted to £534 and his assets to £85, resolved on a liquidation by arrangement, and gave the debtor an immediate discharge. The registration was opposed by one creditor, who had, after the filing of the petition, seized the whole of the debtor's goods under a *fi. fa.*:—*Held*, that the resolutions could not be treated as any abuse of the procedure of the Court, or as having been passed *malâ fide*. *Ex parte* Early. *In re* Golding - C. A. 300

15. —— *Liquidation Petition—Registration of Resolutions—General Meeting—Want of Notice to Creditors—Proof of Notice—Fresh Second Meeting—Discretion of Registrar—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 125, 126—*Bankruptcy Rules*, 1870, *rr.* 97, 98, 256, 282, 295.] Rules 97 and 98 of the Bankruptcy Rules, 1870, apply to bankruptcy only, and do not apply to liquidation by arrangement or composition.—The affidavit, made in accordance with rule 256, of the posting to creditors of notices of a general meeting under a liquidation petition, is only *primâ facie*, not conclusive, evidence that the creditors have received the notices.—The Registrar has a judicial discretion to require further evidence of the receipt of the notices, and, if satisfied that some of the creditors have not received notice, to direct the summoning of a fresh meeting, and the Court of Appeal will not interfere with the exercise of his discretion, unless very clearly satisfied that he has exercised it wrongly. *Ex parte* Dean. *In re* Dean C. A. 313

16. —— *Secured Creditor—Judgment Creditor—Elegit — Receiver — Equitable Execution — Statute* 27 & 28 *Vict. c.* 112, *s.* 1—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 16, *sub-s.* 5—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.] Since the coming into operation of the *Judicature Act*, 1873, it is not necessary for a judgment creditor, who seeks to obtain equitable execution of the judgment debtor's equitable interest in land, previously to sue out an *elegit*.—The appointment of a receiver of the rents of land at the instance

BANKRUPTCY—*continued.*

of a judgment creditor, though conditional upon the receiver's giving security, operates as an immediate delivery of the land in execution.—When the security is afterwards given the order relates back to the date when it was made.—*Edwards* v. *Edwards* (2 Ch. D. 291) explained.—A judgment creditor became the transferee of a legal mortgage of leaseholds belonging to the judgment debtor. He then commenced an action in the Chancery Division, claiming an account and payment of what was due to him on both mortgage and judgment; or a sale of the property and payment out of the proceeds; and the appointment of a receiver. On the same day he obtained *ex parte* an order extending over eight days, appointing an interim receiver of the rents, without security. On the eighth day he obtained, on notice, an order absolute for the appointment of the same person to be receiver of the rents, upon his giving security. On the same day the debtor filed a liquidation petition, and a receiver of his property was appointed by the Court of Bankruptcy. It did not appear which receiver was appointed first. The receiver in the action never gave security. The creditor had not sued out an *elegit*:—*Held* (affirming the decision of *Bacon*, C.J.), that the appointment of the receiver in the action was such a delivery in execution by lawful authority of the mortgaged lands, within the meaning of sect. 1 of the Act 27 & 28 Vict. c. 112, as to render the judgment creditor a secured creditor, within the meaning of sect. 16, sub-sect. 5, of the *Bankruptcy Act*, 1869, and that he was entitled to hold the lands as a security for his judgment debt as well as for his mortgage debt. *Ex parte* Evans. *In re* Watkins - - - - C. A. 252

17. —— *Secured Creditor—Proof—Forfeiture of Security—Mistake — Rectification of Proof—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 16, 40—*Bankruptcy Rules*, 1870, *rr.* 99, 100, 136, 272.] *Semble*, that a secured creditor, who by mistake has omitted from his proof of debt a part of his security, will not necessarily be held to have forfeited that part, but may be allowed to rectify his proof.—Observations on *Ex parte Ashworth* (Law Rep. 18 Eq. 705) and *Ex parte King* (Law Rep. 20 Eq. 273). *Ex parte* Bagshaw. *In re* Ker - - - - - C. A. 304

18. —— *Trustee in Bankruptcy—Power to sue—Power to compromise Actions—Consent of Committee of Inspection—Bankruptcy Act*, 1869, *ss.* 22, 25, 27, 83, *sub-s.* 7.] A trustee in bankruptcy or liquidation, having power to sue either in his own name, or in his official name under sect. 83, sub-sect. 7, of the *Bankruptcy Act*, 1869, possesses all the rights of an ordinary litigant, including a power to compromise an action instituted by him, as, for instance, by consenting to an order being made in the action giving him less than he originally claimed: for the 27th section, as to the trustee's general power to compromise with the sanction of the committee of inspection, does not control or affect his right to compromise actions which he has instituted in his capacity of trustee. Leeming *v.* Lady Murray - - - 123

19. —— *Practice—Time of Appealing to Chief Judge from County Court—Twenty-one Days from "Decision or Order"—Bankruptcy Rules*, 1870, *r.* 143.] The twenty-one days within which an appeal from a County Court to the Chief Judge must be brought, are to be reckoned from the day when the decision of the County Court was pronounced.—*Ex parte Hookey* (4 D. F. & J. 456) followed. *Ex parte* Whitton. *In re* Greaves [881

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—— rr. 260, 289 - - - - 163
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—— *Ball's Trust, In re* (11 Ch. D. 270), disapproved - - - - **493**
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—— *Cookson* v. *Cookson* (8 Sim. 529) not followed - - - - **863**
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—— *Coombe's Trusts, In re* (1 Giff. 91), approved
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—— *Dale & Co., Ex parte* (11 Ch. D. 772), dissented from - - - **696**
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—— *Dundas* v. *Dutens* (1 Ves. 196), form of order in, not followed - - - **764**
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—— *Eade* v. *Jacobs* (3 Ex. D. 335) considered
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—— *Fisher, Ex parte* (Law Rep. 7 Ch. 636), followed - - - - **102**
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—— *Goldsmid* v. *Stonehewer* (9 Hare, App. xxxviii. distinguished - - - **639**
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—— *Hamilton, Duke of,* v. *Meynal* (2 Dick. 788)
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—— *Hastie* v. *Hastie* (1 Ch. D. 562) distinguished
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—— *Hookey, Ex parte* (4 D. F. & J. 456), followed - - - - **881**
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—— *Johnson* v. *Crook* (12 Ch. D. 639) not followed - - - - **517**
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—— *Madeley* v. *Booth* (2 De G. & Sm. 718) commented on - - - - **754**
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—— *Manson* v. *Thacker* (7 Ch. D. 620) not followed - - - - **130**
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—— *North Central Waggon Company* v. *North Wales Waggon Company* (39 L. T. (N.S.) 628) not followed - - - **174**
See PRACTICE. 34.

—— *Orde, Ex parte* (Law Rep. 6 Ch. 881), distinguished - - - - **424**
See BANKRUPTCY. 11.

—— *Pennell* v. *Deffell* (4 D. M. & G. 372) considered - - - - **696**
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—— *Plimpton* v. *Malcolmson* (3 Ch. D. 531, 582) explained - - - - **65**
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—— *Reynolds* v. *Howell* (Law Rep. 8 Q. B. 398) followed - - - - **764**
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—— *Searby* v. *Tottenham Railway Company* (Law Rep. 5 Eq. 409) dissented from - **268**
See LANDS CLAUSES ACT. 2.

—— *Smith* v. *Iliffe* (Law Rep. 20 Eq. 666) considered - - - - **545**
See SETTLEMENT. 3.

—— *Soames* v. *Martin* (10 Sim. 287) followed
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—— *Spalding* v. *Ruding* (6 Beav. 376) followed
See SALE OF GOODS. [**628**

—— *Stokes' Trusts, In re* (Law Rep. 13 Eq. 333), followed - - - - **135**
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—— *Sweetapple* v. *Horlock* (11 Ch. D. 745) corrected - - - - **189**
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—— *Tassell* v. *Smith* (2 De G. & J. 713) not followed - - - - **639**
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—— *Tomkins* v. *Saffery* (3 App. Cas. 213) distinguished - - - - **667**
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—— *Turner* v. *Sargent* (17 Beav. 515) followed
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—— *Turner and Skelton, In re* (13 Ch. D. 130), dissented from - - - 524
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—— *Vane* v. *Vane* (2 Ch. D. 124) corrected 773
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—— *Vaughan* v. *Vanderstegen* (2 Drew. 165) not followed - - - - 216
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—— *Wheate* v. *Hall* (17 Ves. 80) distinguished
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—— *Wilson* v. *Atkinson* (4 D. J. & S. 455) explained - - - - 493
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See Vendor and Purchaser. 4.

CHAMBERS—Practice in - - 138, n.
See Practice. 20.

CHAPEL—Dissenting—Lease—Mortmain Act
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CHARITY—*Lease of Dissenting Chapel—Non-inrolment — Charitable Purposes — Mortmain Act* (9 *Geo.* 2, *c.* 36)—*Non-payment of Rent for Twenty Years—Payment of Arrears—Statute of Limitations* (3 *& 4 Will.* 4, *c.* 27), *s.* 34.] By a lease to six persons described as trustees, a building used as a dissenting chapel, though not so described, and reserving to the lessors a right of access to their pews therein, was demised for ninety-nine years, with a covenant for renewal, at the yearly rent of 1*s.* The lease was not inrolled. New trustees of the chapel had been appointed under the provisions of 13 & 14 Vict. c. 28. Shortly before the expiration of the term the trustees served the reversioner with a notice for renewal. At that time no rent had been paid for above twenty years, but some of the arrears were then paid to and accepted by the reversioner. The reversioner refused to renew the lease. Five years afterwards he brought an action against the trustees to recover possession of the building:—*Held*, that the lease was a grant for charitable purposes, and was void under the *Mortmain Act* (9 Geo. 2, c. 36):—*Held*, also, that the Plaintiff's right of action was not extinguished under sect. 34 of the *Statute of Limitations* (3 & 4 Will. 4, c. 27).—*Semble*, if the lease had contained a power for the trustees to sell the chapel and apply the money to other purposes, it would still have been a grant for charitable purposes within the meaning of the *Mortmain Act*. Bunting *v.* Sargent [330

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—— Former marriage—Dying without having been married - - - 493
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CHILDREN—*continued.*

—— Gift to—Period of distribution - 484
See Will. 6.

CHOSE IN ACTION—Assignment of - 413
See Bankruptcy. 7.

CLASS—Gift to—Period of distribution - 484
See Will. 6.

CLAYTON'S CASE—Rule in - - 696
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CLUB—*Conduct of Member—Power of Expulsion after Inquiry—General Meeting—Insufficiency of Notice—Majority of Two-Thirds of Members Present—Injunction.*] The rules of a club provided that in case the conduct of any member should in the opinion of the committee, after inquiry, be injurious to the welfare and interests of the club, the committee should call upon him to resign, and in the event of his refusal to do so, should call a general meeting, which was to be called on giving a fortnight's notice, at which it should be competent for the votes of two-thirds of those present to expel such member. The committee having called on the Plaintiff, a member of the club, to resign on the alleged ground that his conduct was injurious to its interests, and the Plaintiff having refused to do so, a general meeting was summoned by notices issued on the 1st of November for the 14th of November, when 117 members were present, of whom 115 voted—77 in favour of a resolution for expelling the Plaintiff, and 38 against it. The resolution was declared to be carried. On a motion to restrain the committee from interfering with the enjoyment by the Plaintiff of the use and benefit of the club:—*Held*, on the facts of the case, that the committee had acted without full inquiry and without giving the Plaintiff notice of any definite charge; that the general meeting was summoned without proper notice; that the resolution was carried by an insufficient majority; and that the Plaintiff was entitled to an injunction. Labouchere *v.* Earl of Wharncliffe - 346

COMMITTEE OF INSPECTION - - 123
See Bankruptcy. 18.

COMPANY—*Debentures — Bondholders—Abortive Scheme—Failure of Consideration.*] A concession having been granted by the Bolivian Government for a scheme for opening a communication between *Bolivia* and the *Atlantic* by the *Amazon*, a part of which scheme involved making a railway on Brazilian territory, for which a concession was obtained from the Government of *Brazil*, the *N. Company* was formed in *America* for effectuating the general scheme, and a limited company was formed in *London* for making the railway. In January, 1872 a prospectus was issued in *England* by the Bolivian Government and the two companies, inviting subscriptions to a loan for which bonds were to be given, the payment of which was to be secured by the general liability of the Bolivian Government and by the hypothecation of the customs duties on imports by the new route, and of the entire net profits of the company. It was further stated in the prospectus that the *C. Company*, who had had the line examined, had entered into a contract for making the railway, which was to be made within two years. It was also stated that out of the proceeds of the loan certain persons who were to act as trustees for the

bondholders would retain a sum equal to the contract price of the railway, and apply it from time to time in payment for the works as they proceeded. The public took up the loan to a large amount. The *C. Company* had contracted to make the line for £600,000, and that amount was set apart out of the proceeds of the loan in pursuance of the prospectus. The rest of the money was paid partly to the Bolivian Government and partly to the *N. Company*, by whom it was expended. The *C. Company* commenced the works, but shortly afterwards repudiated the contract on the ground that they had been deceived. In September, 1873, a fresh contract was entered into with other persons for making the railway at a higher price. Nothing was done under this contract, and in August, 1875, it was transferred to another contractor. A dispute having occurred the *N. Company*, in October, 1877, entered into another contract with other persons to make the railway, on terms which would make the cost greatly exceed £600,000, and which in some important particulars, as the Court of Appeal considered, were prejudicial to the rights of the bondholders. The Bolivian Government in the meantime revoked the concession. In March, 1878, a bondholder commenced an action on behalf of himself and all the bondholders except one, who was a Defendant, the Bolivian Government being a co-Plaintiff, to have the fund in the hands of the trustees divided among the bondholders, on the ground that the scheme had become abortive. It was admitted that the cost of making the railway would exceed the sum in the hands of the trustees. The shares in the *N. Company* had for the most part been allotted as fully paid-up shares, and nothing could be obtained from calls. The shares in the *Railway Company* had, by arrangements between the two companies, become the property of the *N. Company*, and there were no shareholders in the *Railway Company* liable to calls. It did not appear that there were any engineering difficulties making it impossible to construct the railway:—*Held*, by *Fry*, J., that as there were no insuperable engineering difficulties, the scheme could not be pronounced impracticable; that the revocation of the concession by the Bolivian Government was unjustifiable, and one to which the Court ought not to give effect, and that the action must be dismissed.—*Held*, by the Court of Appeal, that as the funds in the hands of the trustees were admittedly insufficient to complete the railway, and the company had no means of raising further funds, it had become, in a business sense, impracticable to carry into effect the scheme, and to give the bondholders the security on the faith of which they advanced their money, and that they were entitled to have the fund, which was still *in medio*, in the hands of the trustees, returned to them:—*Held*, further, that assuming the revocation by the Bolivian Government of their concession to be unjustifiable (which in the opinion of the Court of Appeal it was not), still it was the act of a sovereign power with which the Court could not interfere, and made it impossible for the bondholders to have the security on the faith of which their money was advanced:—*Held*, also, that the dissent of some of the bondholders did not take away the right of the others to have their shares of the money returned to them on the ground of the scheme having become abortive.—An agreement had been entered into with the *C. Company*, by which they were entitled to be paid out of the fund in question as the works proceeded. After they had incurred expenses in connection with the works, they repudiated the contract, on the ground that they had been induced to enter into it by misrepresentation:—*Held*, that they had no lien on the fund for the expenses incurred by them. Wilson *v.* Church - - C. A. 1

2. —— *Winding-up—Contributory—Past Members—Companies Act*, 1862, *s.* 38, *sub-s.* 3.] *Bath's Case* (11 Ch. D. 386) held to be inconsistent with the previous decision in *Bath's Case* (8 Ch. D. 334), and reversed on that ground.—A question having arisen in settling the lists of contributories in an insurance company whether one or both of two classes of shareholders were liable on a certain class of policies:—*Held*, that the question could not properly be discussed in the absence of the claimants under the policies, especially as it was possible to decide the case on an independent ground. *In re* Norwich Provident Insurance Society. Hesketh's Case - - C. A. 693

3. —— *Winding-up—Director—Misfeasance—Gift by Vendor of fully paid-up Shares—Estimate of Value—Companies Act*, 1862 (25 & 26 *Vict c.* 89), *s.* 165.] The vendor of property to a company gave to one of the directors a number of shares, part of some which had been allotted to him as fully paid up in payment of the purchase-money of the property. With respect to some of these shares it had been stipulated that the company should retain the certificates for two years. At the commencement of the winding-up of the company some of the shares so given remained registered in the director's name, and the rest had been transferred by him, some for value, others for a nominal consideration. There was evidence that the public had subscribed for the ordinary shares of the company at their par value:—*Held* (affirming the judgment of *Fry*, J.), that the director had been guilty of a misfeasance in relation to the company, and that he must pay to the liquidator the full nominal value of all the shares which had been given to him, and that there was no distinction between those shares, the certificates of which were to be retained for two years, and the others. *In re* Diamond Fuel Company. Metcalfe's Case - - C. A. 169

4. —— *Winding-up—Petition by Shareholder whose Calls are in Arrear—Petition by fully paid-up Shareholder—Appeal by Company from Winding-up Order—Security for Costs.*] A company had for some time ceased to carry on business, though it was not clearly made out that it had so ceased for a year. Its business had been carried on at a constant loss; all its capital had been expended; its property had been sold at a ruinous sacrifice with the exception of some patents which were nearly worthless, and it had nothing left but these patents and a sum of money far from sufficient for payment of its debts. A shareholder, who had paid up his shares with the exception of the last call, presented a petition

COMPANY—*continued.*
for winding up, alleging a case of misconduct against some of the directors, by reason of which, if established, they would be liable to pay considerable sums to the company, which would probably leave a surplus for division among the shareholders. At the hearing, the objection being taken that the Petitioner being in default for payment of calls could not petition, he offered to pay the amount into Court. *Malins*, V.C., allowed him to do so, and made a winding-up order. A liquidator was then appointed, after which the company appealed. One of the directors had in the meantime been ordered to pay a considerable sum under sect. 165 of the *Companies Act*, 1862:—*Held*, that although a liquidator had been appointed the company was not precluded from appealing:—*Held*, also, that the fact that a shareholder is in arrear with calls is not an absolute bar to his petitioning for a winding-up order:—*Held*, that as it was established that the business of the company could not possibly be resuscitated, it was just and equitable that the company should be wound up; and that as a reasonable probability was shewn that sums could be recovered from the directors to such an amount as would leave a surplus for division among the shareholders, an order for winding up had been properly made on the petition of a fully paid-up shareholder.—Where a company alone appeals from a winding-up order without joining any one personally responsible for costs, an application for security for costs will be entertained. *In re* Diamond Fuel Company - - C. A. 400

5. ——*Voluntary Winding-up—Sale of Business to another Company—Validity as against Creditors—Companies Act*, 1862, *s.* 161.] An agreement under the 161st section of the *Companies Act*, 1862, entered into by a company about to be wound up voluntarily for the sale and transfer of its business to another company, is binding upon the creditors of the transferring company.—The remedy of a creditor who cannot get payment of his debt, is to obtain a winding-up order before the expiration of a year.—It is no objection to such an agreement that it contains a stipulation that the purchasing company shall take a portion only of the assets and liabilities of the transferring company, leaving the rest of the debts to be paid by the liquidator of the transferring company: or that it contains a stipulation that the shares in the purchasing company which are to be given as a consideration for the transfer shall be distributed directly among the shareholders of the transferring company, and not given to the liquidator as part of the assets in the winding-up.—If a liquidator in a voluntary winding-up desires to appeal from a decision of a Judge, he ought first to obtain leave from the Judge: otherwise, if his appeal fails, his costs may be refused out of the estate. *In re* City and County Investment Company - - - - C. A. 475

6. —— *Winding-up—Voluntary Winding-up—Transfer or Sale of Business—Special Resolution—Dissentient Member—Notice of Dissent—Requisition to purchase Interest, when to be made—Practice—Liquidator—Application under sect.* 138—*Companies Act*, 1862, *ss.* 161, 162.] Where a company in the course of being wound up voluntarily proposes to transfer or sell its business to another company, and passes a special resolution under sect. 161 of the *Companies Act*, 1862, empowering the liquidators to carry out such transfer or sale, the requisition under that section by any dissentient member of the first-mentioned company to the liquidators either to abstain from carrying the resolution into effect or to purchase his interest, must be contained in the notice of dissent, which the section requires to be in writing and left not later than seven days after the date of the meeting at which the special resolution was passed.—The liquidators in a voluntary winding-up may apply to the Court under sect. 138 of the *Companies Act*, 1862, to determine any question fairly arising in the winding-up, and any such application may be either by motion or summons. *In re* Union Bank of Kingston-upon-Hull 808

COMPENSATION—Jurisdiction - 130, 524
See Vendor and Purchaser. 3, 4.

COMPROMISE—Retractation - - 861
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—— Trustee in bankruptcy - - - 123
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COMPULSORY PURCHASE—Lands Clauses Act—Interest - - - - 365
See Lands Clauses Act. 1.

CONDITION OF PROPERTY—Alteration of 798
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CONDITIONS OF SALE - - - 148
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CONSIDERATION—Bill of sale - - 245
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—— Failure of - - - - 1
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—— Illegality—Marriage with deceased wife's sister - - - - - 202
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CONSOLIDATION OF MORTGAGES - 639
See Mortgage.

CONTEMPT - - - - - 110
See Practice. 22.

—— Attachment - - - 421, 815
See Arrest. 2, 3.

CONTINGENT DEVISE - - - 858
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CONTRACT—Repudiation of—Part performance
See Company. 1. [1

CONVERSATIONS—Interrogatories respecting
See Practice. 17, 18. [370, 375

CONVERSION—Discretion of executor - 654
See Administration. 1.

COPY OF LETTER—Evidence - - 574
See Evidence. 2.

COPYRIGHT—*Book—Right to use Title—Exclusive use of Name "Post Office" Directory—Trade-Mark—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45).] The Plaintiff was the registered proprietor of the copyright of a directory entitled the "*Post Office Directory of the West Riding of Yorkshire*," and he had for several years published "*Post Office Directories*" of other counties. The Defendants published a directory for the town of *Bradford*, which is within the *West Riding*, intituled "*The*

COPYRIGHT—*continued.*

Post Office Bradford Directory," but it was not similar to the Plaintiff's directory in price or appearance. There was no evidence to satisfy the Court that the words "Post Office" in connection with directories had become necessarily connected in the minds of the public with the name of *Kelly*:—*Held*, that the Plaintiff had no right to the exclusive use of the words "Post Office Directory," and his claim for an injunction was refused.—The judgment of *Bacon*, V.C., affirmed. KELLY *v.* BYLES - - - **C. A. 682**

2. —— *Painting — Engraving — Limited Assignment—Infringement—Onus of Proof*—5 & 6 *Vict. c.* 45, *s.* 11—25 & 26 *Vict. c.* 68, *s.* 1.] When the owner of a copyright of a painting assigns the copyright for the purpose of producing an engraving of one size, the right of producing copies of the painting in other ways, or by engravings of other sizes, remains in him, and can be assigned by him to any other person.—And, if the assignee of the right of copying a painting in a particular way alleges that some other publication is an infringement of his copyright, the *onus* is on him to shew that that publication has been taken from his copy and not from the original painting.—Registration of the proprietorship of the copyright of a painting is only *primâ facie* evidence of title, and may be rebutted by the terms of the assignment of the copyright to the person who has made the registration. LUCAS *v.* COOKE - - **872**

COSTS.
See PRACTICE. 6—11, 17, 27.

—— Appeal by liquidator - - - **475**
See COMPANY. 5.

—— Security for—Appeal from winding-up order
See COMPANY. 4. [**400**

—— Security for—Married woman - **510**
See PRACTICE. 16.

—— Specific performance—Claim and counterclaim - - - - **589**
See VENDOR AND PURCHASER. 7.

COUNTER-CLAIM - - - **506, 553, 589**
See PRACTICE. 12, 13, 14.

COUNTY COURT—Bankruptcy jurisdiction—Appeal - - - - - **881**
See BANKRUPTCY. 19.

—— Transfer from—Discovery - - **550**
See PRACTICE. 31.

COVENANT—To settle after-acquired property
See SETTLEMENT. 1. [**189**

CREDITOR—*Bona fides*—Resolution for liquidation - - - - - **300**
See BANKRUPTCY. 14.

—— Meeting of creditors **262, 313, 424, 429**
See BANKRUPTCY. 11, 12, 13, 15.

—— Proof in administration action - **236**
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—— Secured - - - - - **252, 304**
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DE BENE ESSE—Evidence taken in ancient suit
See PRACTICE. 21. [**380**

DEBENTURE HOLDERS—Abortive scheme of company—Return of money - **1**
See COMPANY. **1.**

DEBT—Charge of debts - - - **470**
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—— Debtor's summons — Debt *bonâ fide* discharged - - - - **266**
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—— Married woman - - - **216, 811**
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—— Unascertained—Annuity under separation deed - - - - - **262**
See BANKRUPTCY. 13.

DEBTOR'S SUMMONS - - - **266**
See BANKRUPTCY. 8.

DECEPTION—Trade-mark—Evidence **434, 512,**
See TRADE-MARK. 1, 2, 3. [**513, n.**

DECLARATION BY DECEASED PERSON **558**
See EVIDENCE. 1.

DEED—Mistake—Rectification - - **545**
See SETTLEMENT. 3.

DEFEATING CREDITORS—Mortgage deed—Jurisdiction of bankruptcy - **603**
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DELAY—Proof by creditor—Negligence - **236**
See ADMINISTRATION. 2.

DEVISE—Contingent - - - **858**
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DILAPIDATIONS—Leaseholds—Charge of debts on specific legacy - - - **470**
See ADMINISTRATION. 3.

DIRECTOR—Misfeasance of - - - **169**
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—— Order to pay value of shares—Attachment
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DIRECTORY—Copyright - - - **682**
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DISCHARGE OF DEBTOR - - - **163**
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DISCOVERY.
See PRACTICE. 17, 21, 31.

DISCRETION—Executor - - - **654**
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—— Judge - - - - - **421**
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—— Trustee - - - - - **517**
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DISMISSAL FOR WANT OF PROSECUTION—Costs - - - - - **138**
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DISSENTIENT MEMBER—Transfer of business
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DISSOLUTION OF PARTNERSHIP - **384**
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DRAFT CONVEYANCE—Agreement under Statute of Frauds - - - **855**
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EASEMENT—Light and air - - - **283**
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—— Way of necessity—Alteration of property
See WAY. [**798**

ELEGIT—When not necessary - - **252**
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ENGRAVING—Copyright - - - 872
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ENTRY—By agent—Evidence - - 574
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—— In course of business—Evidence - 558
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EQUITABLE TITLE — Partition — Overriding trust - - - - - 223
See Partition.

EVIDENCE—*Admissibility—Purchase of Shares—Stockbroker's Day-book—Entries by Deceased Partner.*] During the trial of an action to establish the Plaintiff's right to be indemnified by the two Defendants, or one of them, in respect of 200 shares transferred into the Plaintiff's name as trustee for the Defendants or one of them, the Plaintiff desired to prove that the shares had been bought on the *Stock Exchange* for one of the Defendants through his brokers, Messrs. *G. & D. G.* was dead, and the Plaintiff tendered in evidence an entry in the day-book of the firm of a purchase of 200 shares by *G.* for the particular Defendant; and, having proved that the entry was in the handwriting of *G.*, that it was made by him in the ordinary course of business at the time of the purchase as a memorandum of the transaction, and that the ledger of the firm was made up from the day-book, contended that it was admissible in evidence as a declaration made by a deceased person, first, because it was made against the pecuniary interest of the person making it; and, secondly, because it had been made in the ordinary course of business:—*Held*, that it was not admissible upon the first ground, because it might according to the turn of the market, have been to the advantage of the deceased; nor upon the second ground, because it was not made in the performance of any duty. Massey *v.* Allen - - - - 558

2. —— *Entry by Deceased Person—Posting Letter.*] An entry in a diary kept by a deceased agent is not admissible to prove a fact therein stated, unless it is shewn that it was the duty of the agent to make the whole entry.—A witness produced a copy of a letter which he said was made by him, and he swore that he should in the ordinary course of business have posted the original:—*Held*, that this was evidence of the posting, and that, the original not being produced, the copy was good secondary evidence. Trotter *v.* Maclean - - - - - 574

—— Books of Registrar of Trade-marks - 434
See Trade-mark. 1.

—— Practice - - - 380, 589, 652
See Practice. 1, 14, 22.

—— Mistake in deed—Rectification - 545
See Settlement. 3.

EXAMINATION OF MARRIED WOMAN 504
See Husband and Wife. 2.

EXECUTOR—Administration.
See Administration. 1, 5.

—— Authority to carry on business - 465
See Bankruptcy. 6.

EXONERATION — Mortgaged estates — Locke King's Act - - - - 355
See Administration. 4.

EXTENSION OF TIME—Appeal - - 416
See Practice. 3.

FAILURE OF CONSIDERATION — Abortive scheme of company—Debenture holders
See Company. 1. [1

FAILURE OF TRUST - - - 202
See Settlement. 2.

FIDUCIARY RELATION—Director—Contempt
See Arrest. 3. [815

—— Following trust money - - 696
See Banker.

FRAUD—Concealment of incumbrance - 148
See Vendor and Purchaser. 5.

—— Partnership - - - - - 384
See Partnership. 3.

—— Trade-mark—Deception of purchaser 434,
See Trade-mark. 1, 2, 3. [512, 513, n.

FRAUDS, STATUTE OF—Agreement not completed - - - - - 855
See Vendor and Purchaser. 1.

FREEHOLD—Purchase of, after bequest of leasehold - - - - - 359
See Will. 7.

GUARDIAN—Lunatic not so found - 773
See Lunatic. 2.

HUSBAND AND WIFE—*Debt of Wife contracted before Marriage—Liability of Husband—Action against Husband and Wife jointly—Practice—Allegation by Plaintiff of Receipt of Assets by Husband unnecessary—Married Women's Property Acts*, 1870 (*s.* 12) *and* 1874.] In an action against a husband and wife married since the *Married Women's Property Act*, 1874, for the recovery of a debt of the wife contracted before the marriage, it is not necessary that the statement of claim should allege that the husband has received assets of the wife: it is sufficient that he should simply allege that the husband is liable for the debt, leaving it to the husband to exercise his option of pleading non-liability under the provisions of the Act.—A demurrer by the husband to the Plaintiff's statement of claim in such an action, on the ground that the Plaintiff had failed to allege that the husband had received assets, was therefore overruled.—The effect of the Married Women's Property Acts, 1870 (s. 12) and 1874, considered Matthews *v.* Whittle - - - 811

2. —— *Married Women's Property Act*, 1870, *ss.* 7, 8—*Married Woman—Share under Intestacy—Personal Estate above £200—Separate Use—Separate Receipt—Examination unnecessary—Real Estate—"Rents and Profits," whether means Corpus.*] The limit of £200 fixed by sect. 7 of the *Married Women's Property Act*, 1870, applies only to money coming to the married woman by "deed or will," and not to personal estate to which she may have become entitled as next of kin of an intestate: consequently such personal estate, whatever may be its amount or value, belongs, when unaffected by any settlement, to her for her separate use, and may be transferred or paid to her upon her separate receipt, without

HUSBAND AND WIFE—*continued.*
the necessity of any examination.—*Quære*, whether the 8th section does not apply to *corpus*, as the "rents and profits" therein mentioned are not limited to those arising during the life of the married woman. *In re* VOSS. KING *v.* VOSS 504

3. —— *Separate Estate of a Married Woman with Power of Appointment by Will only—Debts of Married Woman—Power exercised in Favour of Volunteers—Property liable for Debts.*] Property was settled on a married woman for her separate use for life, with remainder for such persons as she should by her will appoint, with remainder, in default of appointment, for her children or her next of kin, and the married woman made a testamentary appointment in favour of her daughter:—*Held*, that the appointed property was liable to the payment of the appointor's debts as if it were her separate estate.—*London Chartered Bank of Australia* v. *Lemprière* (Law Rep. 4 P. C. 572) followed.—*Vaughan* v. *Vanderstegen* (2 Drew. 165) not followed. *In re* HARVEY'S ESTATE. GODFREY *v.* HARBEN 216

—— Separate defence of wife—Practice - 510
See PRACTICE. 15.

ILLEGALITY—Consideration for settlement 202
See SETTLEMENT. 2.

IMITATION—Trade-mark - - - 434
See TRADE-MARK. 1.

IMPLICATION—Default of appointment - 189
See WILL. 4.

INFRINGEMENT—Copyright - - 872
See COPYRIGHT. 2.

INJUNCTION - - 110, 324, 498, 651
See PRACTICE. 23—26.

—— Expulsion of member of club - - 346
See CLUB.

—— Trade-mark - - 434, 512, 513, n.
See TRADE-MARK. 1, 2, 3.

INTEREST—Compulsory purchase under Lands Clauses Act - - - - 365
See LANDS CLAUSES ACT. 1.

—— Expense of winning coal - - 277
See MINE. 1.

—— Insolvent estate—Action for administration
See ADMINISTRATION. 5. [136

INTERROGATORIES - 97, 138, n., 370, 375
See PRACTICE. 17—20.

INTESTACY—Share under—Married Women's Property Act - - - 504
See HUSBAND AND WIFE. 2.

INVENTION—Patent—Invention communicated from abroad - - - - 65
See PATENT. 1.

JOINDER OF ISSUE - - - - 553
See PRACTICE. 13.

JOINT AND SEPARATE ESTATE—Bankruptcy
See BANKRUPTCY. 6. [465

JUDGMENT CREDITOR - - - 252
See BANKRUPTCY. 16.

JURISDICTION—Lunatic - - - 773
See LUNATIC. 2.

—— Bankruptcy - - - - 603
See BANKRUPTCY. 9.

—— Prohibition—Injunction - - 498
See PRACTICE. 26.

JURY—Trial by - - - - 769
See PRACTICE. 32.

JUSTICE OF PEACE—Proceedings under Land Drainage Act—Injunction - 498
See PRACTICE. 26.

LANDS CLAUSES ACT—*Compulsory Purchase—Assessment of Purchase-money and Compensation by Jury—Interest, from what Period payable.*] The interest of landowners who were entitled in fee simple subject to certain tenancies was assessed by a jury under the *Lands Clauses Act*:—*Held*, that interest at 4 per cent. was payable from the date of the verdict, although *de facto* possession of the land was not obtained until the expiration, at a subsequent period, of the tenancies subject to which the land was held. *In re* ECCLESHILL LOCAL BOARD - - - - - - 365

2. —— *Railway—Superfluous Land—Abandonment—Lands Clauses Consolidation Act*, 1845, *s.* 127—*Statute of Limitations* (3 & 4 *Will.* 4, *c.* 27), *s.* 2.] A railway company in 1838 bought part of a field under the powers of their Act, and erected a post and rail fence on the boundary. They then made a ditch within the fence, and threw up a bank on which they planted a quickset hedge at the distance of 4 ft. 6 in. from the fence. As the hedge grew up the fence was allowed to fall into decay, and about the year 1846 it was removed. From the year 1854 up to the commencement of this action in 1875, the strip of land between the quickset hedge and the site of the fence was occupied and cultivated with the remainder of the field, partly as an arable field and partly as garden-ground, the railway company in no way interfering with it except that their workmen went over it to trim the hedge:—*Held* (affirming the decision of *Malins*, V.C.), that the circumstances conclusively shewed the strip between the hedge and the line of the post and rail fence to be superfluous land within the meaning of the *Lands Clauses Consolidation Act*, 1845, s. 127, and that it had therefore vested in the owner of the rest of the field, and moreover (notwithstanding *Searby* v. *Tottenham Railway Company* (Law Rep. 5 Eq. 409) that the owner of the rest of the field had had such a possession of the strip in question as was sufficient to extinguish the title of the company under the *Statute of Limitations*. NORTON *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - C. A. 268

[3. —— *Railway Company—"Superfluous Land"—Land over Tunnel—8 Vict. c.* 18, *s.* 127.] A railway company purchased land for the purpose of making an underground railway. They excavated the soil, constructed the line, and then built an arch over it, and replaced the surface over the arch:—*Held*, by *Fry*, J., and by *James* and *Cotton*, L.JJ., *Baggallay*, L.J., doubting, that the company were not authorized by sect. 127 of the *Lands Clauses Consolidation Act*, 1845, to sell

LANDS CLAUSES ACT—*continued.*
the vacant space over the arch as "superfluous land."—"Superfluous land" must be land separated by a vertical, not by a horizontal, boundary from land required for the purposes of the company. *In re* Metropolitan District Railway Company and Cosh - - - C. A. 607

LEASE—Dissenting chapel—Charity—Mortmain
See Charity. [320

—— Sale of—Underlease - - - 754
See Vendor and Purchaser. 2.

LEASEHOLD—Bequest of—Dilapidations - 470
See Administration. 3.

—— Bequest of—Subsequent purchase of fee 359
See Will. 7.

LEAVING ISSUE - - - - 189
See Will. 4.

LEGAL ESTATE OUTSTANDING - - 754
See Vendor and Purchaser. 2.

LETTER—Copy of—Evidence - - 574
See Evidence. 2.

LIABILITY OF HUSBAND—Debt of wife 811
See Husband and Wife. 1.

LIEN—Purchase of share of partnership—Dissolution - - - - 384
See Partnership. 1.

—— Sale of goods—Stoppage *in transitu* - 628
See Sale of Goods.

—— Solicitor - - - - - 885
See Solicitor. 1.

LIGHT—*Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *s.* 3—"*Consent or Agreement.*"] *K.*, the owner in fee of a freehold house, in 1814 put out four new windows, and signed and gave to *S.*, the owner in fee of an adjacent freehold house overlooked by those windows, a document declaring that they were put out and remained upon the leave of *S.*, and that he, *K.*, would, on the request of *S.*, or his heirs or assigns, at any time thereafter block up the same, and in the meantime would pay *S.*, his heirs and assigns, sixpence a year for the indulgence. This document was not signed by *S.* The rent was paid down to 1859. In 1877 *S.'s* successor in title called upon *K.'s* successor in title, who had bought the property in 1865 with notice of the document, but had never paid any rent under it, to block up the four windows, and proceeded to obstruct the access of light to them. *K.'s* successor in title thereupon brought this action against him for an injunction, claiming to have acquired an indefeasible right to the access of light to the four windows by actual enjoyment for twenty years without intermission:—*Held*, first, that the enjoyment of light by *K.* and his successors had been by virtue of the document of 1814, and that such document, although signed by *K.* only, was a consent or agreement expressly made or given for the purpose of such enjoyment within the meaning of the 3rd section of the *Prescription Act*, so as to prevent *K.* and his successors from acquiring any right to the access and use of light under that section; and secondly, that the agreement, having been acted upon by payment of rent thereunder to within twenty years from the commencement of the action, was enforceable in equity irrespective of the statute.—It was proved that in 1859 the agent of the owner of

LIGHT—*continued.*
S.'s tenement paid to him sixpence, stating verbally that it was for the lights in *G.'s* house (the house which had belonged to *K.*):—*Held*, that, the agent being dead, this was evidence of payment of the rent by *G.* in 1859. Bewley *v.* Atkinson C. A. 283

LIMITATIONS, STATUTE OF—Inadvertent trespass - - - - - 574
See Mine. 2.

—— Superfluous lands of railway - - 268
See Lands Clauses Act. 2.

LIQUIDATION BY ARRANGEMENT.
See Bankruptcy. 10—15.

LIQUIDATOR—Application to Court - 808
See Company. 6.

—— Costs—Appeal - - - - 475
See Company. 5.

LUNATIC—*Order to inspect Documents deposited by Lunatic.*] Before a committee had been appointed of a lunatic's estate the Court made an order for the Official Solicitor to inspect the securities and other documents which the lunatic had deposited with a company for safe custody. *In re* Campbell (a Lunatic) - - C. A. 323

2. —— *Person of Unsound Mind not so found — Guardianship and Maintenance — Form of Order.*] On a petition by a person of unsound mind not so found for payment of a fund in Court and for the appointment of a guardian, the fund was ordered to be paid to the person proposed as guardian, he undertaking to apply it for the maintenance, comfort, and support of the Petitioner.—*Vane* v. *Vane* (2 Ch. D. 124) corrected. *In re* Brandon's Trusts - - - 773

3. —— *Summary Jurisdiction Clauses — Lunacy Regulation Act* (25 & 26 *Vict. c.* 86, *ss.* 12, 13.] In ascertaining whether the property of a person of unsound mind is of the amount of £1000 or less, so as to bring the case within 25 & 26 Vict. c. 86, s. 12, his debts and the expenses incurred in his past maintenance since he became of unsound mind are to be deducted. *In re* Faircloth (a supposed Lunatic) - C. A. 307

MAINTENANCE—Children—Annuity for - 564
See Will. 1.

—— Lunatic not so found - - - 773
See Lunatic. 2, 3.

MANAGER OF FARM—Fiduciary capacity 338
See Arrest. 1.

MANDATORY INJUNCTION—Removal of buildings - - - - - 324
See Practice. 24.

MARRIAGE—Deceased wife's sister—Illegal consideration - - - - 202
See Settlement. 2.

MARRIAGE SETTLEMENT.
See Settlement.

MARRIED WOMAN.
See Husband and Wife.

—— Separate defence - - - 510
See Practice. 16.

MEETING—Creditors.
See Bankruptcy. 11—15.

—— Members of club - - - 346
See Club.

MEMBER OF CLUB—Expulsion - - 346
See CLUB.

MEMBER OF COMPANY—Interrogatories - 97
See PRACTICE. 17.

MINE—*Licensee—Winning—Apportionment—Interest.*] By a deed of grant and license the licensee was allowed to win and work all and every or any of the coal mines, seam and seams of coal, within certain lands, and, in the first place, out of the profits to reimburse himself all expenses incurred in the winning thereof; and it was provided that, after repayment of all expenses of winning the said colliery, coal mines or coal mine, seam or seams of coal, he should pay such royalty as should from time to time be awarded by two arbitrators to be named by the parties respectively. There were three seams of coal under the land. The licensee reached one of them by a driftway from an adjoining colliery and worked the coal. He afterwards, by similar means, reached and worked another of them. The third was also reached, but was abandoned as worthless:—*Held* (affirming the decision of *Fry*, J.), that the coal was won according to the meaning of the deed so soon as the first seam was reached through the driftway so that it could be worked, and that the deed did not contemplate a distinct winning in respect of each seam; and that, therefore, expenses incurred after the first seam had been reached could not be treated as expenses of winning.—The licensee mixed the coals gotten under the license with those gotten from his own colliery and sold them together. He alleged that the coals gotten under the license were inferior in value to the other coals:—*Held* (affirming the decision of *Fry*, J.), that as they had been mixed by the licensee's own act, he was not entitled to an inquiry as to how much the selling price of the coals was diminished by the mixture of the coals gotten under the license:—*Held* (varying the decree of *Fry*, J.), that interest at £5 and not £4 per cent. ought to be allowed on the expenses of winning. LORD ROKEBY *v.* ELLIOT - - - C. A. 277

2. —— *Trespass — Unauthorized Working — Bonâ fide Expectation of Title—Account—Allowances—Cost of Severance—Statute of Limitations* (21 *Jac.* 1, *c.* 16, *s.* 3)—*Trustees—Notice.*] The owner of a mine commenced to work from his own mine into an adjoining mine vested in trustees, in the *bonâ fide* belief that he was about to obtain from them a contract authorizing him so to work, and gave to one of the trustees notice that he was about to commence working:—*Held*, that the working, though no contract was afterwards entered into, and the trustees had no power to make one, ought to be treated on the same footing as if it had been commenced inadvertently, and in taking an account of the minerals gotten without authority the Defendant was allowed the cost of severing them, as well as the cost of bringing them to bank. But, from the time that notice was given to the Defendant that no contract would be made with him authorizing him to work, his working was treated as fraudulent, and he was allowed only the cost of bringing the minerals to bank.—So long as a wrongful working is to be treated as inadvertent the *Statute of Limitations* applies, and the account will only be directed for six years from the issue of the writ. But the *onus* is on the Defendant to shew that minerals gotten by him were gotten before the six years. TROTTER *v.* MACLEAN - - - - - 574

MISTAKE—Mutual—Discovered after completion of contract - - - - 524
See VENDOR AND PURCHASER. 4.
—— Proof in bankruptcy - - - 304
See BANKRUPTCY. 17.
—— Settlement—Rectification - - 545
See SETTLEMENT. 3.

MORTGAGE—*Consolidation—Parties—Redemption Suit—Trustees—Rules of Court*, 1875, *Order XVI., r.* 7.] The rule that the mortgagee of two estates belonging to the same mortgagor may consolidate them so that one cannot be redeemed without the other, does not apply to a case in which one of the mortgages was created subsequently to the assignment of the equity of redemption to the person seeking to redeem.—*Tassell* v. *Smith* (2 De G. & J. 713) not followed.—In a suit for redemption, bare trustees of the equity of redemption sufficiently represent the trust estate without the presence of the persons beneficially interested under Order XVI., r. 7.—*Goldsmid* v. *Stonehewer* (9 Hare, App. XXXVIII.) distinguished.—The decision of *Bacon*, V.C., reversed.—Where mortgages of two different properties had been made by the same mortgagor at different dates, and the mortgages had been consolidated by a mortgagee, and the mortgagor had conveyed the equities of redemption to different purchasers, the equity of redemption of the second mortgage being conveyed before the equity of redemption of the first mortgage:—*Held*, in an action for redemption by the owner of the equity of redemption of the second mortgage, that he was entitled to the first right of redemption of both mortgages. MILLS *v.* JENNINGS - - - - - C. A. 639

—— Impeachment of—Jurisdiction of bankruptcy
See BANKRUPTCY. 9. [603
MORTMAIN - - - - - 320
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NE EXEAT REGNO - - - - 242
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NEW TRUSTEES—Appointment of - 135
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See BANKRUPTCY. 7.
—— Injunction by telegram - - 110
See PRACTICE. 22.
—— Meeting of creditors - - - 313
See BANKRUPTCY. 15.
—— Meeting of members of club - - 346
See CLUB.
—— To dispute debt—Bankruptcy petition—Withdrawal - - - - 321
See BANKRUPTCY. 4.
—— To make time of the essence of the contract
See VENDOR AND PURCHASER. 6. [153
—— Trial - - - - - 160
See PRACTICE. 29.

ONUS PROBANDI - - - - 245
See Bankruptcy. 3.
ORDER AND DISPOSITION - - 465
See Bankruptcy. 6.
ORNAMENTAL TIMBER - - - 179
See Waste.

PAID-UP SHARES - - - - 169
See Company. 3.
PAINTING—Copyright - - - 872
See Copyright. 2.
PARTIES—Mortgage suit - - - 639
See Mortgage.

PARTITION — *Equitable Estates — Overriding Trust.*] Under a will two persons were equally entitled to real property for life, with remainder to their children and issue, who were not yet ascertained. The trustees of the will had, during the lives of the tenants for life, powers of working a quarry on the estate, and making roads, &c., over the property for the purpose, and were directed to work the quarry and divide the profits among the persons entitled:—*Held*, that, while the overriding power and trust existed, the Court had no jurisdiction to make a decree for partition or sale under the Partition Acts. Taylor *v.* Grange - - - - - 223

PARTNERSHIP—*Death of Partner — Business carried on by Surviving Partner—Use of Deceased Partner's Capital—Division of Profits.*] *A.* and *B.* having carried on business in partnership with unequal capitals for a term of years, under articles which provided for an equal division of profits after payment of interest upon their respective capitals, continued, after the expiration of the articles, to carry on business until *A.*'s death upon the footing of the articles. At *A.*'s death his capital was more than three times as large as that of *B.*, and *B.*, who claimed under the expired articles the right to purchase the business, continued, without the consent of *A.*'s representatives, to carry it on and to use *A.*'s capital therein. In 1873, *A.*'s representatives commenced this suit against *B.*, and at the hearing in 1875, it was decided that *B.*'s option to purchase ceased when the articles expired. The business was then sold under the order of the Court, after having been thus carried on for about three years:—*Held*, on further consideration, that after making a proper allowance to *B.* for managing the business, the profits earned since *A.*'s death must be divided between *A.*'s representatives and *B.*, according to the proportion in which the partners were entitled to the capital employed in the business. Yates *v.* Finn - - - - - 839

2. —— *Expiration of Term—Continuance of Business without Fresh Articles—Operation of Old Articles.*] When, after the expiration of the term limited by partnership articles, the business is carried on by the partners without the execution of fresh articles, all those provisions of the old articles which are not inconsistent with a partnership at will continue to apply to the partnership at will thus constituted.—Under such circumstances:—*Held*, that a provision in the articles that, on the decease of one of the partners before the expiration of the partnership term, the surviving partner should pay to his executors the sum of £1500, as the purchase-money for his interest in the goodwill of the business, applied to the partnership at will constituted by the carrying on of the business without fresh articles after the expiration of the partnership term. — *Essex* v. *Essex* (20 Beav. 442) followed.—*Cookson* v. *Cookson* (8 Sim. 529) not followed. Cox *v.* Willoughby - - - - - 863

3. —— *Rescission of Partnership Agreement—Fraud—Lien on Assets for Purchase-Money.*] The Plaintiff was induced by the fraud of the Defendant to purchase a share of his business, and to enter into partnership with him. Judgment being given for the rescission of the agreement, and the dissolution of the partnership:—*Held*, that the Plaintiff was entitled, in respect of the purchase-money which he had paid, to a lien on the surplus of the partnership assets after satisfying the partnership debts and liabilities, and that, in respect of any sums which he had paid or might pay in satisfaction of partnership debts, he was entitled to stand in the place of the partnership creditors to whom he made the payments. Mycock *v.* Beatson - - - - 384

—— Carried on by executors of bankrupt 465
See Bankruptcy. 6.
PARTNERSHIP ACTION—Costs - - 845
See Practice. 10.
PAST MEMBER - - - - 693
See Company. 2.

PATENT—*Insufficient Specification—Specification too general — Invention communicated from Abroad.*] The specification of a patent is bad if one of the materials to be used is described by a generic term comprising a variety of species, the majority of which would be unsuitable. — The specification of a patent is bad if a skilled mechanic would not, without performing a series of experiments, be able to construct the machine from the description.—The specification of a machine for crushing meal described the rollers between which the meal was to be crushed as "to have a surface consisting of material containing so much silica as not to colour the meal or flour. I prefer to make them of iron coated with china, and finally turned with diamond tools;" and the claim was *inter alia* for the use of material "of the hardness required." It appeared that the rollers must be made of a very hard china, such as had scarcely been made in *Europe* during this century, and specially tough, and must be fixed in a peculiar manner to an iron core or spindle which carried them; and according to the evidence, a miller or a skilled mechanic would not, without making a series of experiments, discover of what china the rollers must be made or how they must be fixed to the spindle:—*Held* (affirming the judgment of *Fry*, J.), that the specification was insufficient, and the patent invalid.—*Per Fry*, J.:—Though the grantee of a patent for an invention communicated to him by a foreigner resident abroad is only bound to tell the public all that he himself knows, yet, if the original inventor has not told him enough to enable him so to describe the invention as that it can be constructed by the aid only of the specification, the patent will be invalid.—*Plimpton* v. *Malcolmson*

PATENT—*continued.*
(3 Ch. D. 531, 582) explained. WEGMANN *v.* CORCORAN - - - - C. A. 65

2. —— *Sealing Patent — Provisional Protection—Priority.*] The Crown will in some cases, after granting one patent, grant a second patent for a similar invention.—*D.* and *R.* independently applied on the 29th of April, 1879, for letters patent for inventions, which were, for the purpose of the decision, taken to be similar. *R.'s* letters patent were sealed on the 25th of July, 1879, and on the 5th of August, 1879, he entered an opposition to the sealing of *D.'s* letters patent. There was no suggestion of fraud:—*Held*, that *D.'s* letters patent ought to be sealed and be dated as of the day of application, which was also the date of *R.'s* letters patent.—*Ex parte Bates & Redgate* (Law Rep. 4 Ch. 577) questioned. *In re* DERING'S PATENT - - - - C. A. 393

3. —— *Sealing Patent — Application after Period of Provisional Protection—Extended Time for Filing Specification*—15 & 16 *Vict. c.* 83, *s.* 20; 16 & 17 *Vict. c.* 115, *s.* 6.] The word "caveat" in the 20th section of the *Patent Law Amendment Act* means anything in the nature of an opposition at any stage, and is not confined to opposition before the Lord Chancellor.—There is jurisdiction to seal a patent notwithstanding that application for the seal may not have been made within the period of provisional protection and one month further, provided the delay has been caused by opposition.—The Lord Chancellor has power, in such a case, to extend the time for filing the final specification beyond one month after the expiration of the term of provisional protection. *In re* SOMERSET AND WALKER'S PATENT. *In re* JOHNSON'S PATENT - - C. A. 397, 398, n.

PAYMENTS—Appropriation of - - 696
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PERCENTAGE—Accounts—Court fees - 91
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PETITION— Adjudication of bankruptcy — Petitioner's debt - - - 321
See BANKRUPTCY. 4.

—— Winding-up - - - - 400
See COMPANY. 4.

PLAINTIFF—Addition of, by amendment 388
See PRACTICE. 28.

PLEADING - - - 388, 506, 553, 589
See PRACTICE. 12, 13, 14, 28.

POSTING DOCUMENTS—Charges by solicitor 318
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POSTING LETTER—Evidence—Course of business - - - - - 574
See EVIDENCE. 2.

POST OFFICE—Use of name - - 682
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POWER—Of appointment by deed or will 189
See WILL. 4.

—— Of disposition *inter vivos* and not by will 144
See WILL. 5.

—— To give receipts - - - 141
See TRUSTEE. 2.

POWER OF SALE — Settlement — Direction to settle - - - - 848
See WILL. 3.

PRACTICE—*Appeal — Leave to give fresh Evidence—Rules of Court*, 1875, *Order* LVIII., *r.* 5.] Where a party wishes to examine fresh witnesses at the hearing of an appeal, he must apply for leave by motion previously to the hearing of the appeal.—*Hastie* v. *Hastie* (1 Ch. D. 562) only applies to affidavits and documentary evidence. DICKS *v.* BROOKS - - - C. A. 652

2. —— *Appeal—Notice to discontinue Action.*] A Plaintiff gave notice of appeal from the refusal of an injunction. Shortly afterwards the Plaintiff's solicitors wrote to the Defendants' solicitors to withdraw the notice of appeal. Two days after this the Plaintiff's solicitors gave the Defendants' solicitors notice of discontinuance of the action. The Defendants' solicitors declined to consent to the withdrawal of the appeal except on terms to which the Plaintiff's solicitors did not agree, and the appeal came on in its turn:—*Held*, that the discontinuance of the action put an end to the appeal, and that no order could be made except to strike it out of the paper. CONYBEARE *v.* LEWIS - - - - - C. A. 469

3. —— *Appeal—Time for appealing—Rules of Court*, 1875, *Order* LVIII., *r.* 9—*Order under Vendor and Purchaser Act*, 1874—*Extension of Time—Intention to appeal—Costs.*] The time within which an appeal can be brought from an order under the *Vendor and Purchaser Act*, 1874, s. 9, is twenty-one days.—The mere communication by an unsuccessful party to his opponent of his intention to appeal is not sufficient notice of appeal; nor, in the absence of other special circumstances, is it ground for an extension of time for appealing.—A respondent who, after the time for appealing has expired, knowingly allows his opponent to incur expense in preparing for the appeal, without warning him of his intention to object to the appeal being heard, may be deprived of his costs.—The grounds for allowing an extension of time for appeal considered. *In re* BLYTH AND YOUNG - - - - C. A. 416

4. —— *Appeal—Undertaking not to appeal.*] A claim under a winding-up having been refused by the Master of the Rolls, the counsel for the liquidator asked the counsel for the claimant whether he intended to carry the case further, and on being informed that he did not, said that he should not ask for costs. An order was drawn up dismissing the claim without costs and not containing any undertaking not to appeal:—*Held*, that as no undertaking not to appeal was embodied in the order, an appeal would lie. *In re* HULL AND COUNTY BANK. TROTTER'S CLAIM C. A. 261

5. —— *Compromise—Intervention of Court—Retractation.*] A compromise agreed to by parties in Court, after discussion of the case, with the concurrence of their legal advisers and with the assent of the Court, cannot afterwards be varied on the mere allegation that the consent was given inadvertently without evidence of mistake or misapprehension. — *Dictum* in *Attorney-General* v. *Tomline* (7 Ch. D. 389) explained. DAVIS *v.* DAVIS - - - - - - 861

6. —— *Costs—Action brought by Solicitor without Authority — Judicature Act*, 1875, *s.* 21—*Practice in Cases where no Rule laid down by New Orders.*] Where a solicitor has commenced an action in the name of a Plaintiff without authority,

PRACTICE—*continued.*

the proper course is for the Plaintiff to serve notice of motion on the Defendant, as well as on the solicitor, that the action may be dismissed, and that the solicitor may pay the costs of the Plaintiff as between solicitor and client, and the costs of the Defendant as between party and party.—In cases where no rule of practice is laid down by the new Orders, and there is a variance in the old practice of the Chancery and Common Law Courts, that practice is to prevail which is considered by the Court most convenient. Newbiggin-by-the-Sea Gas Company *v.* Armstrong [C. A. 310

7. —— *Costs—Action brought by Solicitor without Authority—Liability of Plaintiff's Solicitors—Right of Proof against Estate of Deceased co-Plaintiff.*] The name of a Plaintiff having been inserted on the record without his knowledge, consent, or authority, on motion by the Defendants to dismiss for want of prosecution, and on motion by the Plaintiff to have his name struck out from the record:—*Held*, that the solicitors to the record who had purported to act for the said Plaintiff were liable to pay his costs of the motion as between solicitor and client, and also to pay the costs of the Defendants of the action and all the motions therein.—It appearing that the solicitors had inserted the Plaintiff's name through the fault of a deceased co-Plaintiff:—*Semble*, they would have a right of proof for the costs they were ordered to pay against his estate.—The form of order in *Dundas* v. *Dutens* (1 Ves. 196) not followed.—The practice at common law as laid down in *Reynolds* v. *Howell* (Law Rep. 8 Q. B. 398) followed. Nurse *v.* Durnford - - - - - 764

8. —— *Costs—Action to execute Trusts of Settlement—Unnecessary Application to Court.*] One of two tenants for life under a settlement brought an action, claiming to have the trusts executed by the Court. The statement of claim alleged that the surviving trustee had committed a breach of trust, and asked to have new trustees appointed in the place of him and a deceased trustee. The settlement contained a power to appoint new trustees, exerciseable by the tenants for life. The Plaintiff's income had always been regularly paid to him. At the trial the charges against the trustee were abandoned, and it was admitted that there was no ground for his removal:—*Held*, that the Plaintiff was entitled to judgment for the execution of the trusts, but that, the action being unnecessary, he must pay the costs of it up to and including the trial. Fane *v.* Fane - 228

9. —— *Costs—Offer by Defendant.*] The solicitors of a Defendant wrote to the Plaintiff's solicitors that they were prepared to advise the Defendant to settle on certain terms:—*Held*, that this was not such an offer as would free the Defendant from liability to the subsequent costs of the action, inasmuch as he might have refused to follow the advice of his solicitors. Trotter *v.* Maclean - - - - - - 574

10. —— *Costs—Partnership Action.*] The balance found due in a partnership action from the firm to one of the partners must be paid out of the assets in priority to the costs of the action.

PRACTICE—*continued.*

—*Austin* v. *Jackson* (11 Ch. D. 942, n.) approved and followed. Potter *v.* Jackson - 845

11. —— *Costs—Shorthand Notes.*] As a general rule the Court of Appeal refuses the costs of shorthand notes of the evidence in the Court below. Kelly *v.* Byles - - - 682

12. —— *Counter-claim—Reference to Statements in Pleadings—Judgment in one Division of the High Court not to be enforced without Leave of Judge in another Division—Motion to exclude Counter-claim.*] A counter-claim may refer to statements of fact in the pleadings on which the Defendant relies without setting them out *in extenso*.—A Defendant mortgagee, in an action in the Chancery Division to set aside his mortgage, commenced an action in the Queen's Bench Division to enforce his security and obtained judgment, which was not to be enforced without the leave of the Judge of the Chancery Division. He then counter-claimed for leave to enforce that judgment, or in the alternative for judgment for what was due to him in respect of the mortgage.—On motion to exclude the counter-claim:—*Held*, that, as no action could have been brought when judgment had already been obtained in the Queen's Bench Division, the counter-claim was wrong and must be struck out. Birmingham Estates Company *v.* Smith - - - 506

13. —— *Counter-claim—Reply—Joinder of Issue generally—Rules of Court*, 1875, *Order* XIX., *rr.* 18, 20, 21.] Plaintiffs asserted the right to use Defendants' name as a trade name, for goods manufactured and sold by themselves, and, alleging that they had recently heard that the Defendants claimed the exclusive right to the name, claimed a declaration that the Plaintiffs were entitled to use the name, and also an injunction to restrain the Defendants from representing that the goods manufactured by them, the Plaintiffs, were an imitation of the goods manufactured by the Defendants.—The Defendants by their statement of defence made a number of allegations as to the origin and history of the manufacture, and stated that they had discovered that the Plaintiffs had recently sold goods manufactured by them (the Plaintiffs) with a mark greatly resembling that of the Defendants. Then, by counter-claim, the Defendants repeated and relied on the allegations as if they had been repeated verbatim, and, alleging misrepresentation, claimed an injunction to restrain the Plaintiffs from selling goods not manufactured by the Defendants, as and for goods manufactured by the Defendants.—To the counter-claim the Plaintiffs replied by joining issue:—*Held*, that the allegations in the counter-claim must be specifically dealt with, and that the reply was irregular. Benbow *v.* Low - 553

14. —— *Counter-claim—Reply—Admission—Evidence—Costs—Rules of Court*, 1875, *Order* XIX., *rr.* 3, 17, 20, 22.] The Defendant to an action delivered a statement of defence and counter-claim. The defence contained various admissions and allegations of fact, and then, by way of counter-claim, the Defendant repeated "the several matters hereinbefore stated and admitted," and claimed certain relief. The Plaintiff, by his reply, after making certain admissions and joining issue on the rest of the statement of

PRACTICE—*continued.*

defence, "in reply to the statements alleged by way of counter-claim" repeated "the several matters stated in the statement of claim and the admissions hereinbefore made," and said that, "save as stated in the statement of claim or hereinbefore admitted, each of such allegations is untrue:"—*Held*, that this amounted to an admission of all the statements alleged by way of counter-claim.—But leave to amend was given.—The issues of fact on the claim and the counter-claim being identical:—*Held*, that the Plaintiff was not entitled to adduce fresh evidence in reply on the counter-claim. GREEN *v.* SEVIN - 589

15. —— *Court Fees—Accounts—Percentage on Receipts—Rules of Court*, 1875 (*Court Fees*) *Schedule.*] A testator made two persons his executors, and the same persons, with one other, the trustees of his real and personal estate. A decree was made for the administration of the estate, and the usual accounts ordered to be taken. The Chief Clerk required separate accounts to be taken of the receipts and payments of the executors, and of the receipts and payments of the trustees:—*Held* (affirming the decision of *Fry*, J.), that the accounts of the executors and trustees were rightly taken separately, and that the percentage for Court fees was payable both on the gross receipts of the executors and on the gross receipts of the trustees; and that the receipts of the trustees properly included (1) the residue handed over to them by the executors, (2) temporary loans advanced to them by their bankers, and (3) sums transferred from the trustees' deposit account at their bankers to their drawing account. ARMITAGE *v.* ELWORTHY - - - C. A. 91

16. —— *Defence—Married Woman—Separate Defence—Special Leave—Security for Costs—Rules of Court*, 1875, *Order XVI., r.* 8.] A married woman cannot appear or defend separately from her husband without first obtaining special leave under Rules of Court, 1875, Order XVI., rule 8: an order for leave obtained upon a petition of course is irregular.—A married woman in receipt of a separate income of £1500 per annum was not required to give security for costs on obtaining leave to defend separately under Order XVI., rule 8. NOEL *v.* NOEL - - - - 510

17. —— *Discovery—Answer to Interrogatories—Member of Company—Costs—Rules of Court*, 1875, *Order XXXI., rr.* 4, 6, 10.] Where a member of a company is examined on interrogatories under Order XXXI., r. 4, he cannot refuse to file his affidavit until he has been paid his taxed costs of making it; nor will the Court make any order as to the payment of his costs separately from the costs of the company:—*Semble*, an ordinary member of a company ought not to be examined on interrogatories unless the Judge is satisfied that there is no officer of the company capable of making the discovery, and that the member proposed to be examined has the required information.—The decision of *Fry*, J., reversed. BERKELEY *v.* STANDARD DISCOUNT COMPANY - C. A. 97

18. —— *Discovery—Interrogatories—Rules of Court*, 1875, *Order XXXI., rr.* 5, 8, 19.] In an action for dissolution of partnership in the business of surgeons, Plaintiff alleged that the Defendant "for some time past and since from about" a certain date "so behaved and conducted himself towards the Plaintiff in the presence of . . . many of the patients of the partnership," as to make it impossible for the Plaintiff to carry on practice with him.—An interrogatory by the Defendant calling upon the Plaintiff to set forth the particulars and circumstances of the occasions on which the Defendant had so behaved and conducted himself, allowed.—An interrogatory as to the names of the persons in whose presence the Defendant had so behaved and conducted himself, disallowed.—An interrogatory calling upon the Plaintiff to set forth accounts held to be premature, and disallowed. LYON *v.* TWEDDELL - 375

19. —— *Discovery—Interrogatories—Rules of Court*, 1875, *Order XXXI., rr.* 5, 8, 19.] In an action against two Defendants by a Plaintiff claiming to be a creditor of a late partner of one of the Defendants, for all of whose creditors it was alleged the Defendants were trustees under a deed of assignment of certain property, the defence in substance was, that the firm were never indebted to the Plaintiff, that the deed contained no trust for the payment of any debt of the late partner, but was an assignment by way of mortgage to secure repayment to the Defendants of a sum advanced by them to pay such of the late partner's debts as they should in their discretion think fit, that neither the late partner nor the Defendants ever recognised the Plaintiff as a creditor, that the Plaintiff was not a party nor privy to the deed, and that he was not aware of its existence until the bankruptcy of the late partner. The defence admitted a certain alleged interview, but denied the alleged purport of the conversation thereat.—Plaintiff stated that he had seen "some accounts" which shewed that the Defendants had not properly discharged the debts.—Interrogatories filed by the Defendants calling upon the Plaintiff to set forth how the firm became collectively liable to the Plaintiff, when communication of the fact of the execution of the deed by the Defendants to the Plaintiff was made, and what accounts they were which the Plaintiff had seen, were allowed.—An interrogatory as to the persons in whose presence communication of the above fact was made, having been withdrawn;—*Eade* v. *Jacobs* (3 Ex. D. 335) observed upon.—An interrogatory whether it was the fact that certain allegations made in the statement of claim were true, and whether it was not the fact that certain statements in the defence were true, was disallowed. JOHNS *v.* JAMES - - - - - 370

20. —— *Discovery—Further Answer to Interrogatories.*] Applications for further answer to interrogatories ought to be made in Chambers, not in Court. CHESTERFIELD *v.* BLACK - 138, n.

21. —— *Discovery—Production of Documents before Defence—Rules of Court*, 1875, *Order XXXI., r.* 12.] In an action for redemption against a mortgagee in possession, an order for production of documents made before the defence was delivered, and without any special case for production being made, was affirmed.—*Hancock* v. *Guerin* (4 Ex. D. 3) considered. UNION BANK OF LONDON *v.* MANBY - - - - - C. A. 239

22. —— *Evidence taken de bene esse—Ancient Suit—Modern Suit for the same Purpose—Publica-*

PRACTICE—*continued.*

tion of ancient Evidence allowed.] In a suit instituted in 1815 for a declaration of title to mines and minerals witnesses were examined by commission *de bene esse* in that year. Nothing had been done in that suit since 1818.—In modern suits for, in effect, the same purpose the evidence had been closed and the suits were ready to be set down for hearing.—On motion in all the suits publication of the ancient evidence was allowed, and an order was made as in *Duke of Hamilton* v. *Meynal* (2 Dick. 788; 2 Ves. Sen. 497). Moggridge *v.* Hall. Lady Llanover *v.* Homfray. Phillips *v.* Lady Llanover - - - - - 380

23. —— *Injunction—Breach of Injunction—Notice—Telegram—Sale under Execution—Bankruptcy of Debtor—Sheriff's Officer—Auctioneer.*] Sufficient notice of the granting of an injunction may be given by telegram; but, if it is sought to commit for contempt a person who, after receiving such a notice, disregards it, the Court must decide upon the particular facts whether he had in fact notice of the injunction, and it is the duty of those who ask for the committal to prove this beyond reasonable doubt.—A person who has violated an injunction will not be committed for contempt when he swears that, though he had received notice of it by telegram, he *bonâ fide* believed that no injunction had been granted, and the circumstances shew that such a belief was not unreasonable.—It is the duty of a sheriff's officer who receives notice by telegram, purporting to be sent by solicitors in *London*, of an injunction being granted by the Court of Bankruptcy to restrain a sale in the country under an execution, to telegraph to the Court of Bankruptcy, or to the *London* agents of the sheriff, to ascertain whether an injunction has really been granted.—This, however, is not the duty of the auctioneer who is conducting the sale; he is only bound to communicate with the sheriff's officer who has instructed him to sell.—A sheriff's officer, who is not himself present at the sale, and who has no actual notice of the injunction, is not responsible for the act of his deputy who allows the sale to be continued after receiving notice by telegram.—A *London* solicitor, who obtains an order from the Court of Bankruptcy in *London* restraining a sale under an execution in the country, ought, instead of telegraphing the order to the sheriff's officer, to telegraph it to a solicitor at the place, as his agent, asking him to give notice of it to the persons affected. *Ex parte* Langley. *Ex parte* Smith. *In re* Bishop - - - - C. A. 110

24. —— *Injunction—Restrictive Covenants—Mandatory Injunction.*] An estate was laid out for building and sold in lots, and the purchasers of the different lots executed a deed by which they covenanted with the vendor not to erect any buildings beyond a certain line, the covenant being subject to a proviso that it should not be personally binding on any one except in respect of breaches committed during his sole or joint seisin of the lot to which it related. In 1872 the purchaser of Lot B built upon it a bakehouse beyond the line. The Plaintiff about the same time bought the opposite Lot A. No complaint appeared to have been made by any one of the erection of the bakehouse until this action was commenced.

PRACTICE—*continued.*

In 1876 the Defendant purchased the residue of a mortgage term in Lot B, and in 1877 commenced building upon that plot a wooden stable beyond the line. The Plaintiff, as soon as he heard of this, wrote to complain on the 17th of March, 1877, at which time the stable was built up to the eaves. The Defendant proceeded to complete the stable, which was finished on the day on which the Plaintiff commenced an action for an injunction to restrain the Defendant from allowing any buildings to continue on his land beyond the line:—*Held*, by *Bacon*, V.C., that a mandatory injunction ought to be granted to compel the removal of all the erections on the Defendant's plot beyond the line.—*Held*, on appeal, that the injunction ought not to extend to the building which had been allowed to remain for five years without complaint, but must be confined to buildings erected since the Defendant acquired his title.—*Baxter* v. *Bower* (23 W. R. 805) explained.—The *Judicature Act*, 1873, s. 26, sub-s. 8, has not altered the principles on which the Court acts in granting injunctions. Gaskin *v.* Balls [C. A. 324

25. —— *Injunction — Undertaking — Pulling down Buildings.*] An order having been made restraining the Defendant from proceeding with certain buildings, he appealed, offering an undertaking to abide by any order the Court might make at the hearing as to pulling down or altering any buildings erected by him. The Court of Appeal being of opinion that the right to an interlocutory injunction was not established, discharged the order, taking from the Defendant an undertaking in the terms of his offer:—But *held*, that, without any undertaking, the Court would have jurisdiction at the trial to order the pulling down of any buildings erected after the commencement of the action, or after notice had been given of the Defendant that the Plaintiff objected to the building. Smith *v.* Day - - C. A. 651

26. —— *Jurisdiction — Prohibition — Injunction—Justices of the Peace—Restraining Proceedings — Multiplicity of Actions — Land Drainage Act*, 1861 (24 & 25 *Vict. c.* 133), *ss.* 72, 73, 76—*Judicature Act*, 1873, *s.* 24, *sub-s.* 7; *s.* 25, *sub-s.* 8.] The jurisdiction to grant prohibition is now conferred by the Judicature Acts upon every Judge of the High Court; but, inasmuch as one of the main objects of the Acts (*Judicature Act*, 1873, s. 24, sub-s. 7) is to enable the Court to decide, if possible in one proceeding, all the questions in dispute in the same matter and between the same parties, and (*Judicature Act*, 1873, s. 25, sub-s. 8) to grant an injunction in all cases in which it shall appear to the Court "just and convenient" so to do, the Court may, in any case in which it has power to grant prohibition, grant an injunction to restrain the proceedings in the inferior Court.—For instance, the Court will grant an injunction to restrain a landowner from taking proceedings before justices of the peace on an irregular notice under sects. 72 and 73 of the *Land Drainage Act*, 1861 (24 & 25 Vict. c. 133).—*Quære*, whether, under the *Land Drainage Act*, 1861, the justices of the peace have any jurisdiction to decide questions as to the validity of any notice served under sects. 72 and 73 of the Act.—*Semble*,

PRACTICE—*continued.*

the only questions they are authorized to decide (sect. 76) are (1.) Whether the proposed drainage works will cause any injury to the land on which they are proposed to be constructed; and (2.) Whether the injury (if any) can be fully compensated in money. HEDLEY *v.* BATES - 498

27. —— *Motion to dismiss — Court or Chambers — Costs of Motion — Rules of Court*, 1875, *Order* XXXVI., *r.* 4*a*.] An application to dismiss for want of prosecution may, according to circumstances, be made either in Chambers or to the Court.—If the usual notice of motion is given, and the Plaintiff does not at once submit to speed the cause and tender the costs of the notice, the Defendant if the usual order is made will have his costs of making the motion in Court. EVELYN *v.* EVELYN - - - - - 138

28. —— *Parties — Amendment of Pleading — Addition of New Plaintiff — Rules of Court*, 1875, *Order* XVI., *rr.* 2, 13.] An action was brought to compel the Defendants specifically to perform an agreement into which they had entered to accept a lease of a coal mine from the Plaintiff. When the agreement was entered into, and when the action was commenced, it was supposed that the Plaintiff was tenant for life of the property under the will of her husband, and that she had a power of leasing. After notice of trial had been given the Plaintiff died, and her executor obtained the common order of revivor. After this it was discovered that the Plaintiff was tenant for life of the property under her marriage settlement, and that she had no power of leasing. She had signed the agreement "for myself and those entitled after me," though this did not appear in the statement of claim. The persons entitled in remainder, of whom the executor was one, desired to adopt the action and to be added as co-Plaintiffs, alleging that the agreement had been entered into with their knowledge and approbation:—*Held*, that rule 13 of Order XVI. of the Rules of Court, 1875, applied, and that the remaindermen must be added as co-Plaintiffs with the executor in his representative capacity. LONG *v.* CROSSLEY [388

29. —— *Parties — Bankruptcy of Defendant after Notice of Trial — Order of Revivor against Trustee — Non-appearance — Filing Pleadings and Notice of Motion for Judgment — Non-appearance of Defendant at Trial — Affidavit of Service of Notice of Trial — Rules of Court*, 1875, *Order* XVI., *r.* 13; *Order* XIX., *r.* 6; *Order* XXXVI., *rr.* 18, 20; *Order* L., *rr.* 2, 4, 5.] A Defendant became bankrupt after service of notice of trial, and the common order of revivor was then made against his trustee, and served on him. The trustee did not enter an appearance. Notice was served on him that the action was restored to the paper for trial, but he did not appear at the trial: *Held*, that it was not necessary for the Plaintiff to file the pleadings or a notice of motion for judgment as against the trustee, under rule 6 of Order XIX. of the Rules of Court, 1875.—*Semble*, that when a Defendant does not appear at the trial, it is not necessary for the Plaintiff to prove service of notice of trial. CHORLTON *v.* DICKIE - 160

30. —— *Service out of the Jurisdiction — Rules*

PRACTICE—*continued.*

of Court, 1875, *Order* XI., *r.* 1.] On the 14th of May, 1877, an agreement was entered into at *Bombay* between the Plaintiff, the Defendant *M. M.*, and the Defendants *N. & Co.* (an Indian firm), to work certain mines in *India* as a joint adventure, in which *N. & Co.* were to find the capital and the Plaintiff to acquire the mining rights, and each partner was to take one-third of the profits.—*N. & Co.* afterwards went into liquidation in *India*, and their property became vested in trustees residing in *Bombay*. The Plaintiff subsequently ascertained that on the 17th of April, 1879, an agreement had been entered into in *England* between the Defendant *H.*, as the agent of *N. & Co.'s* trustees, and *G.*, the agent of a Scotch company, for the sale of the mining rights to the Scotch company, and that such agreement contained no mention of the Plaintiff's rights.—The Plaintiff then brought an action against *N. & Co.*, their Indian trustees, *H.* (the agent) *M. M.*, and the Scotch company, and by the indorsement on his writ claimed a declaration that under the agreement of the 14th of May, 1877, he was entitled to one-third of the profits of the mining adventure, and that the Defendants and their estates in liquidation might be declared liable to account for and pay all moneys obtained by the Defendants respectively by dealing with the mining properties and fraudulently concealing the Plaintiff's interest therein; with an injunction to restrain the Defendants respectively from carrying the agreement of the 17th of April, 1879, into effect, except on the footing of the Plaintiff being entitled to one-third of the profits, and for ancillary relief.—The Plaintiff, three out of the five members of the firm of *N. & Co.*, and *H.* were in *England*, but all the other parties to the action were out of the jurisdiction; and the Plaintiff obtained, under Order XI., rule 1, of the Rules of Court, 1875, an order authorizing service out of the jurisdiction of the writ on the Scotch company in *Scotland*.—Upon motion by the Scotch company to discharge this order:—*Held*, 1. That the balance of convenience was in favour of the action being tried here.—2. That the case was substantially a partnership case, in which an English Court might properly exercise jurisdiction; and that the Scotch company were not entitled to have their case separated from that of the other Defendants.—3. That the order for service out of the jurisdiction on the Scotch company was rightly made under Order XI., rule 1, because, (*a*) the action "affected," within the meaning of the second branch of the rule, the contract of April, 1879, which was made within the jurisdiction, and (*b*) because the same contract constituted a breach within the jurisdiction of a contract made abroad.—Order. XI. considered. HARRIS *v.* FLEMING - - - - 208

31. —— *Transfer from County Court — Ejectment Action — Discovery — Rules of Court*, 1875, *Order* XXXI., *r.* 12.] In an action for the recovery of land, commenced by plaint in a County Court and afterwards transferred to the Chancery Division of the High Court, the proceedings after transfer will be conducted according to the practice of the High Court, so that the Plaintiff is not entitled to discovery and production until he has

PRACTICE—*continued.*
delivered a statement of claim in the action. Davies *v.* Williams - - - - 550

32. —— *Trial by Jury—Rules of Court*, 1875, *Order* xxxvi., *rr.* 3, 26.] In an action relating to the ownership of land and to the obstruction of a right of way in the country, the Defendants having given notice under Rules of Court, 1875, Order xxxvi., rule 3, for the trial of issues of fact by jury, on motion by the Plaintiff that the action might be tried by a Judge without a jury:—*Held*, that, as it appeared that the question in the action was mainly one of title depending on certain conveyances, plans, and photographs, it could be more conveniently tried without a jury under Order xxxvi., rule 26. Wedderburn *v.* Pickering - - - - - - 769

33. —— *Writ of Ne Exeat Regno.*] The Plaintiff, a mortgagee of a German ship which had been lost, commenced an action in the Chancery Division against the owner on the covenant contained in the mortgage deed, and applied for a writ of *ne exeat regno*, alleging by affidavit that the Defendant was about to leave *England*, and that the debt would be in danger of being lost if he was not prevented from so doing, but not shewing that the Defendant's absence would prejudice the Plaintiff in the prosecution of the action:—*Held*, that the writ must be refused, for that the claim was a mere legal demand, for which the Plaintiff could not before the passing of the *Judicature Act* have sued in the Court of Chancery, and that the Defendant could only be prevented from leaving *England* in the case provided for by the *Debtors Act*, 1869, s. 6:—*Held*, further, by the Master of the Rolls, that the result would have been the same as to an equitable debt before the passing of the *Judicature Act*. Drover *v.* Beyer - - - C. A. 242

34. —— *Writ specially indorsed — Rules of Court*, 1875, *Order* xiv., *r.* 1*a*—*Summons to sign Judgment admitting Affidavit of Plaintiff in Reply to Defendant's Affidavit.*] Upon an application by the Plaintiff by summons, under Rules of Court, 1875, Order xiv., rule 1a, for leave to sign final judgment, the Court will allow the Plaintiff to read an affidavit made by him in reply to the Defendant's affidavit.—*North Central Waggon Company* v. *North Wales Waggon Company* (39 L. T. (N.S.) 628) not followed. Girvin *v.* Grepe [174

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SALE OF BUSINESS—Company—Validity as against creditors - - - 475
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SALE OF GOODS—*Stoppage in Transitu—End of Transit—Sub-sale.*] The mere fact that the purchaser of goods has resold them, and that the bill of lading has been made out in the name of the sub-purchaser, does not put an end to the *transitus*, or destroy the right of the original vendor to stop the goods *in transitu*.—The rule being that effect will be given to a vendor's right of stoppage *in transitu*, so far as the exercise of that right will not interfere with the rights of third parties acquired for value, it follows that an unpaid vendor, who has given a valid notice to stop *in transitu* before his vendee has received the purchase-money of the goods from his sub-purchaser, is entitled, on the principle of *Spalding* v. *Ruding* (6 Beav. 376), to have the original purchase-money satisfied out of the unpaid purchase-money of the sub-purchaser. *Ex parte* GOLDING DAVIS & CO., LIMITED. *In re* KNIGHT - C. A. 628

SEALING PATENT - - 393, 397, 398, n.
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SEPARATE ESTATE—*continued.*
—— Assignment of leaseholds to wife—Declaration of trust - - - - 822
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SET-OFF—Defaulting trustee—Bonus on policy of insurance - - - - 232
See TRUSTEE. 1.

SETTLEMENT — *Covenant to settle Wife's Property—"Beneficially entitled"—Defeasible Reversionary Interest.*] By an ante-nuptial settlement the husband and wife, after settling certain trust funds belonging to the wife, covenanted with the trustees "that if at the time of the solemnization of the intended marriage the wife shall be, or if at any time thereafter and during the joint lives of the husband and wife, she, or her husband in her right, shall become beneficially entitled to any real or personal property, estate or effects, for any estate or interest whatsoever, then and in every such case the husband and wife and all other necessary parties shall, as soon as circumstances will permit," assure such property and effects to the trustees in trust for sale, and to hold the proceeds upon the trusts thereinbefore declared of the wife's trust funds, "or as near thereto in all respects as the deaths of parties and other circumstances will admit":—*Held*, that a reversionary interest in personalty vested in the wife at the date of the marriage, but liable to be divested by the exercise of a power of appointment, was included in the covenant.—*In re Mackenzie's Settlement* (Law Rep. 2 Ch. 345) considered.—*Sweetapple* v. *Horlock* (11 Ch. D. 745) corrected. *In re* JACKSON'S WILL - - - 189

2. —— *Marriage with Deceased Wife's Sister—Illegal Consideration—Failure of Trusts.*] *J. P.*, previously to going through the ceremony of marriage with his deceased wife's sister, executed a settlement reciting the intended marriage, by which certain property was assigned to trustees in trust for the settlor until the solemnization of the marriage, and after the solemnization thereof, and after the decease of *J. P.*, to pay the interest to the intended wife for life, and then for the benefit of his two children by his former wife and such children as he should have by his intended marriage; but if there should be no such child or children, then for *J. P.*, his executors, administrators, and assigns:—*Held*, that, as no valid marriage could take place between *J. P.* and his deceased wife's sister, the trust in favour of himself until the solemnization of such marriage continued, and the subsequent trusts never having arisen, the property remained in *J. P.*, and formed part of his general estate. PAWSON *v.* BROWN 202

3. —— *Mistake — Rectification — Evidence — Equitable Life Estate followed by Legal Remainder —Conveyance of outstanding Legal Estate—Form of Order for Rectification.*] The Court will order rectification of a deed on the ground of mistake upon the evidence of the Plaintiff alone, where no further evidence can be obtained.—By a post-nuptial settlement, real estate belonging to the wife was conveyed unto *A.* and his heirs "to the use of" *A.*, his executors and administrators, during the life of the wife, "upon trust" to pay

SETTLEMENT—*continued.*

the rents and profits to her for her separate use; and from and after her decease, in case of the death of her husband in her lifetime, "to the use of the heirs and assigns" of the wife for ever: but in case of the wife predeceasing the husband, then to the use of the husband, his heirs and assigns for ever.—The wife having survived her husband, she brought an action against *A.'s* legal personal representative to have the settlement rectified on the ground that by a technical mistake in the form of the settlement her equitable life estate and the legal estate in remainder did not coalesce within the rule in *Shelley's Case*, so as to give her, as was intended in the events that had happened, an absolute estate in fee.—The Plaintiff's case was supported by an affidavit by herself alone:—*Held*, that her uncontradicted affidavit was sufficient, and ordered that the settlement be rectified so as to vest the legal estate in fee simple to the Plaintiff:—*Held*, also, that a conveyance of the outstanding legal estate was unnecessary.—Form of order for rectification. —*Smith* v. *Iliffe* (Law Rep. 20 Eq. 666) discussed. Hanley *v.* Pearson - - - - 545

4. —— *Wife's Property—Children of Former Marriage—Words "die without ever having been married"—Absence of Context.*] By a settlement on the marriage of a widow, containing a recital that she had three children by her former marriage but no other reference to such children, the trust property was settled, in the events which happened, in trust, subject to her life interest, for the persons who would have been entitled thereto if she had died possessed thereof "without ever having been married." She died leaving the said children surviving:—*Held*, that the property went to the persons who would have been entitled thereto if she had died a spinster.—*Wilson* v. *Atkinson* (4 D. J. & S. 455) explained.—*In re Ball's Trust* (11 Ch. D. 270) and *Upton* v. *Brown* (12 Ch. D. 872) disapproved. Emmins *v.* Bradford. Johnson *v.* Emmins - - C. A. 493

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SHERIFF—Injunction restraining execution—Contempt - - - - 110
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SOLICITOR—*Lien—Production—Bankruptcy Act*, 1869, *s.* 96—*Bankruptcy Rules*, 1870, *r.* 110.] A solicitor is not, on the ground of his lien on documents of a bankrupt in respect of professional services before the bankruptcy, entitled to refuse to produce such documents for examination by

SOLICITOR—*continued.*

the trustee. *In re* Toleman and England. *Ex parte* Bramble - - - - 885

2. —— *Proof in Bankruptcy—Solicitor's Bill of Costs—Taxation—Charges for addressing and posting Documents for Client—6 & 7 Vict. c. 73, s. 37.*] A solicitor who tenders a proof in the bankruptcy of his client, in respect of costs due to him by the client, is not entitled to insist on having his bill referred for taxation to the Taxing Master, but the Registrar has jurisdiction to determine the amount due, availing himself, if necessary, of the advice of the Taxing Master.—A solicitor has no statutory right to have the amount of his charges ascertained by taxation only.—A solicitor is not entitled to charge a profit upon the addressing and posting of documents for his client. *Ex parte* Ditton. *In re* Woods [C. A. 318

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TRADE-MARK—*Imitation — Injunction — Name acquired in Market—Deception of ultimate Purchaser—Onus of Proof—Use of different Names for the same Class of Goods—Evidence—Admissibility—Books of Registrar of Trade-marks.*] If

TRADE-MARK—*continued.*

one trader appropriates a material and substantial part of a trade-mark which belongs to another trader he is bound to use such precautions as to avoid the reasonable probability of error and deception, and the *onus* is on him to shew that purchasers of the goods will not be deceived.—If the goods of a trader have acquired in the market a name derived from a part of the trade-mark which he affixes to them, a rival trader is not entitled to use a ticket which is likely to lead to the application of the same name to his goods, even though that name is not the only name by which the goods of the first trader have been known, or though it has been always used in conjunction with some other words.—Where a trader has a right to a trade-mark on goods sold in a foreign market, an injunction will be granted to restrain the export of goods under another trade-mark which may deceive the ultimate purchasers, although it would not deceive Englishmen or the dealers in the foreign market.—Where a trader has innocently adopted a trade-mark which is calculated to deceive by its similarity to another person's trade-mark, his continuing to use it after complaint has been made is strong evidence of fraud.—Injunction against the use of trade-mark by Defendant was made general, although the Plaintiff had never used his trade-mark except in the Indian market.—The books of the Registrar of Trade-marks which shew marks the registration of which has been refused, are not evidence that these marks are *publici juris*.—The judgment of *Fry*, J., affirmed. Orr Ewing & Co. *v.* Johnston & Co. - - - - - **C. A. 434**

2. —— *Name—Neighbouring Shop—Evidence of Deception.*] In a trade-mark case the fact that one person has been deceived is not conclusive as to the misrepresentation.—A tradesman may use a name, although he is aware that a neighbouring tradesman intends to use that name.—A bootmaker having a shop running up *Bedford Street*, with the front and entrance to the *Strand*, wrote up over his shop the words "*Civil Service Boot Supply.*" The *Civil Service Supply Association* were at that time building a large store at the other end of *Bedford Street*, in which when finished they opened a general shop, and they afterwards opened a boot and shoe shop in *Tavistock Street*, which was not far off. One of the customers of the Association had gone to the shop of the bootmaker, mistaking it for that of the Association. The Association brought an action to restrain the bootmaker from using the words: —*Held*, that under the circumstances there was no intention on the part of the bootmaker to deceive, and that no rational person would have been deceived by the words so used; and action dismissed. Civil Service Supply Association *v.* Dean - - - - - - **512**

3. —— *Name—Neighbouring Street—Evidence of Deception.*] The Plaintiff had for many years been the owner of a shop for the sale of carriages called the "*Carriage Bazaar.*" The Defendant set up a shop for carriages in the same street which he called the "*New Carriage Bazaar*":—*Held*, that the Plaintiff was entitled to an injunction against the use of the name. Boulnois *v.* Peake - - - - - - **513, n.**

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—— Title of book - - - - **682**
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TRESPASS—Working of mine—Statute of Limitations - - - - **574**
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See Practice. 32.

TRUST—Action to execute—Amending action—Costs - - - - - **228**
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—— Declaration of—Voluntary assignment **822**
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—— Following trust money - - - **696**
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—— For sale—Devise to trustees and their heirs without "assigns" - - **774**
See Vendor and Purchaser. 8.

TRUSTEE—*Breach of Trust—Retainer—Defaulting Cestui que Trust—Set-off.*] A policy of assurance on the life of *H.* was taken in the names of trustees and a settlement was executed by virtue of which the bonuses payable on the policy were to be held upon trust for *H.*, and the money assured, on the trusts of the settlement.—*H.* obtained possession of and misappropriated a portion of the trust funds:—*Held*, that the trustees were not entitled as against *H.'s* executrix to impound or retain the bonuses to make good the trust funds misappropriated by *H.*, not as being settled property, because there was a prior resulting trust of them for *H.*: not by way of set-off, because they were not payable till after *H.'s* death. Hallett *v.* Hallett - - - - - **232**

2. —— *Power to give Receipts by Anticipation—Coalition of Life Interest and Reversion.*] Where a fund is vested by a settlement in trustees for *A.* for life and over, and the reversion has been subsequently settled, the person entitled to the life interest and the trustees of the subsequent settlement are entitled to call for a transfer of the trust fund, and can give the original trustees an effectual discharge although the settlement does not provide for a transfer or payment by anticipation. Anson *v.* Potter - - - **141**

—— Authority to carry on business - **465**
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—— Defaulting—Attachment - - **338**
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—— New trustees—Trustee Relief Act - **135**
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—— Purchase by - - - - **654**
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TRUSTEE ACT, 1850, *s.* 32—"*New*" *Trustees—Appointment of continuing Trustees in place of themselves and an absconded Trustee.*] One of the four trustees of a will having absconded:—*Held*, that the Court had jurisdiction under s. 32 of the *Trustee Act*, 1850, to appoint the remaining three as sole trustees in place of themselves and the fourth.—*In re Stokes' Trusts* (Law Rep. 13 Eq. 333) followed. *In re* HARFORD'S TRUSTS - 135

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UNLIMITED COMPANY—Shares in—Duty of executor - - - - 654
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UNSOUND MIND—Person of, not so found—Appointment of guardian - - 773
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VENDOR AND PURCHASER—*Agreement—Statute of Frauds, s.* 4—*Draft Conveyance.*] The memorandum or note of an agreement required by the 4th section of the *Statute of Frauds* must be a memorandum of an agreement complete at the time the memorandum is made—A letter from an alleged purchaser inclosing and referring to a draft conveyance in which it was recited that he had agreed to purchase land:—*Held* not to be a memorandum of a completed agreement. MUNDAY *v.* ASPREY - - - - - 855

2. —— *Agreement for Sale of Lease—Underlease — Misdescription — Abstract — Outstanding Legal Estate.*] Although according to the decided cases, a vendor who contracts for the sale of leasehold property described as held under a lease, cannot, if nothing further is said, make a good title unless it is held under an original lease, yet in a case where the particulars and conditions of sale of property so described contained enough to give notice to a purchaser that the property was held under a derivative lease:—*Held*, that the purchaser could not on that account refuse to complete, or claim compensation on the ground of misdescription.—Where an abstract of title shews a good equitable title in the vendor, with power to get in the legal estate under the Trustee Acts or otherwise, it is unnecessary for the abstract to shew the devolution of the legal estate.—*Madeley* v. *Booth* (2 De G. & Sm. 718) commented on. CAMBERWELL AND SOUTH LONDON BUILDING SOCIETY *v.* HOLLOWAY - - - 754

3. —— *Misdescription—Conditions of Sale—Compensation after Conveyance.*] Where in an agreement for the sale of land the conditions provided that if any error or misstatement should be found it should not annul the sale, but that compensation should be made in respect thereof, and an error in the quantity of the land was discovered after the conveyance had been executed:—*Held*, that the purchaser was entitled to compensation.—*Manson* v. *Thacker* (7 Ch. D. 620) not followed. *In re* TURNER AND SKELTON - - - 130

4. —— *Mutual Mistake—Completion of Contract — "Caveat Emptor."*] Plaintiff sold by auction a term of fifty years in a public-house at a rent of £105, and subject to a covenant against Sunday trading. It was stated at the sale that the freeholder had offered to release the covenant on having £25 additional rent. Defendant was the purchaser, and after the sale received an abstract which shewed that the vendor was an underlessee. After this the Plaintiff procured from the freeholder a release of the covenant, and the Defendant accepted a lease at a rent of £130 and paid the purchase-money partly by an order on his brewers. On the day after completion he became aware that the release from the freeholder was not effectual without a release from the original lessee, and stopped payment of the order on the brewers until this could be obtained. The required release could not be obtained, and the Defendant claimed to retain his bargain with compensation:—*Held*, that compensation could not be given for an error discovered after completion.—*In re Turner and Skelton* (13 Ch. D. 130) dissented from.—*Held*, also, that Plaintiff was entitled to specific performance of the original contract at the rent of £105, and without a release of the covenant. ALLEN *v.* RICHARDSON - 524

5. —— *Specific Performance—Condition limiting Length of Title—Objection to prior Title disclosed by Vendor—Reference as to Title—Concealment of Incumbrance—Penalty—*22 & 23 *Vict. c.* 35, *s.* 24.] Freehold property was sold in 1877 subject to a condition that the title should commence with a deed dated the 30th of December, 1867, and that no earlier or other title should be required or inquired into by the purchaser:—*Held*, that this condition did not preclude the purchaser from insisting on an objection to the prior title which was not discovered through any inquiry made by him, but was accidentally disclosed by the vendor.—But *held*, that, in an action by the vendor for the specific performance of the contract, the purchaser was only entitled to an inquiry whether the vendor could make a good holding title to the property.—Where there is a condition of sale that no title to the property sold shall be shewn before a certain date, *semble*, that sect. 24 of 22 & 23 Vict. c. 35, does not apply to the concealment of an incumbrance prior to that date. SMITH *v.* ROBINSON - - - - - 148

6. —— *Specific Performance—Notice to make Time of Essence of Contract—Reasonableness—Laches.*] When, after a contract for the sale of land has been entered into, a notice is given to make time of the essence of the contract, the question whether the notice is reasonable or not must be judged of as at the date when it is given. —The Plaintiff held a lease from the Defendant which gave him an option of purchasing the demised property at any time during the term, on giving the lessor three months' previous notice in writing. On the 24th of March, 1877, the Plaintiff gave the Defendant notice of his intention to exercise the option. There were some difficulties in completing the Defendant's

VENDOR AND PURCHASER—*continued.*

title to the property, and an abstract of title was not delivered to the Plaintiff's solicitor till the 17th of June, 1878. The Plaintiff's solicitor not having acknowledged the receipt of the abstract, and having neglected to answer several letters from the Defendant's solicitors, they, on the 16th of September, wrote to the Plaintiff himself, asking whether he intended to complete the purchase. The Plaintiff replied the next day that he would write at once to his solicitor. On the 24th of September, 1878, no further communication having been received from the Plaintiff or his solicitor, the Defendant gave the Plaintiff a notice in writing, requiring him to complete the purchase, and stating that, unless he completed it on or before the 31st of October, 1878, the Defendant would treat the contract as rescinded, and that in that respect time should be deemed of the essence of the contract. On the 26th of September, 1878, the Plaintiff acknowledged the receipt of the notice, and said he had seen his solicitor, who had promised to proceed as soon as possible. On the 1st of November, 1878, no further communications having been received from the Plaintiff or his solicitor, the Defendant's solicitors wrote to the Plaintiff, that the Defendant, in pursuance of his notice, declared the contract at an end; and they requested the return of the abstract, and demanded payment of rent for the property. The Plaintiff had been in possession of the property ever since his notice to purchase, but had refused to pay any rent after the 24th of June, 1877. On the 21st of November, 1878, the Plaintiff commenced his action for the specific performance of the contract to purchase:—*Held*, that the notice of the 24th of September fixed an unreasonably short time for the completion of the purchase, and was therefore invalid.—Specific performance was decreed, and the Defendant was ordered to pay the costs of the action up to and including the trial. Crawford *v.* Toogood - - - - - 153

7. —— *Specific Performance—Notice to make Time of Essence of Contract—Validity—Reasonableness.*] When time is not originally made of the essence of a contract for the sale of land one of the parties is not entitled afterwards by notice to make it of the essence, unless there has been some default or unreasonable delay by the other party.—After a delay of two years on the part of a vendor, he gave notice to the purchaser to complete his contract within three weeks, and that, if he did not do so, the vendor would treat the contract as at an end:—*Held*, that the time limited for completion was, under the circumstances, unreasonably short, and the notice therefore of no effect.—A vendor brought an action claiming a declaration that his contract for sale was at an end. The purchaser made a counter-claim for the specific performance of the contract. Judgment was given for the Defendant, with costs, on both claim and counter-claim:—*Held*, that the Defendant was entitled to deduct his costs from his purchase-money in priority to a mortgagee of the Plaintiff, whose mortgage had been created after the contract for sale, but before the commencement of the action. Green *v.* Sevin 589

8. —— *Will—Trust for Sale—Devise to Trustees, "their Heirs, Executors, and Administrators"—Omitting "Assigns"—Devise of Trust Estates—Sale by Devisees of Surviving Trustee—Doubtful Title—Summons under Vendor and Purchaser Act, 1874—Costs.*] Where real estate is devised to trustees and "their heirs" (omitting "assigns") in trust for sale, the trust must be considered as annexed, not to the person, but to the fee simple estate taken by the trustees, so that the trust can be executed by the devisees of trust estates of the surviving trustee.—A testator by his will, dated in 1845, devised and bequeathed his real and personal estate to his wife for life, subject to the payment of his debts, and from and after her decease to *A.* and *B.*, "their heirs, executors, and administrators, upon trust to sell and dispose thereof at such times and in such manner as they my said trustees shall deem expedient."—*A.* and *B.* both predeceased the tenant for life, *B.*, the surviving trustee, having devised his trust estates. Upon the death of the tenant for life, *B.'s* devisees contracted to sell part of the real estate of the original testator:—*Held*, upon a summons under the *Vendor and Purchaser Act*, 1874, that *B.'s* devisees could make a good title, and one which the Court would force upon a purchaser.—*Cooke* v. *Crawford* (13 Sim. 91) held to be overruled.—Observations on the duty of the Court to decide doubtful questions of title as between vendor and purchaser.—The question of costs as between vendor and purchaser where the title is disputed considered. Osborne to Rowlett - - 774

VESTED INTEREST—Ambiguous gift over 189
See Will. 4.

VESTING - - - - - - 517
See Will. 8.

VOLUNTARY SETTLEMENT — *Assignment of Leaseholds by Husband to Wife "as her separate Estate"—Declaration of Trust—Principal and Agent—Fraudulent Mortgage by Agent—Liability of Principal.*] A husband, being about to leave *England* for a residence in *India*, executed an assignment by deed to his wife, who was to remain in *England*, of a leasehold dwelling-house, "to hold the same unto" the wife, "her executors, administrators, and assigns, as her separate estate." No trustees were appointed; the husband and wife being the only parties to the deed. The title deeds were allowed to remain in the possession of the wife:—*Held*, that the deed of assignment operated as a valid declaration of trust in favour of the wife.—The wife, having parted with possession of the deeds (all but the assignment) to an agent, in order to raise a sum of £200 upon them for the wife, and having asked for a return of the deeds without success, the agent, by forging the name of the husband to a mortgage deed and other instruments, raised a sum of £1200, which he appropriated to his own use:—*Held*, that there was no such negligence on the part of the wife as to bar her title to relief against the mortgagees. Fox *v.* Hawks. Hawks *v.* Fox - - 822

VOLUNTARY WINDING-UP - - 475, 808
See Company. 5, 6.

VOTING—Meeting of creditors - 262, 424, 429
See Bankruptcy. 11, 12, 13.

WASTE—*Settled Estate—Tenant for Life—Equitable Waste—Ornamental Timber—Right to cut—Timber Inquiry.*] An equitable tenant for life, unimpeachable for waste, is entitled to the proceeds of ornamental timber cut by him, where the timber so cut is such as the Court would itself direct to be cut for the preservation and improvement of the remaining ornamental timber: but it does not follow that the Court will not, at the instance of the remainderman, grant an injunction restraining the tenant for life from cutting any ornamental timber which it has become necessary and proper to cut, and direct that the cutting be done under its supervision.—The doctrine of equitable waste considered.—Form of inquiry as to ornamental timber. BAKER *v.* SEBRIGHT - 179

WAY—*Easement—Way of Necessity—Landlocked Tenement — Change of Condition — Agricultural Land—Building Land.*] Where the owner of a close surrounded by his own land grants the land and reserves the close, the implied right to a way of necessity to and from the close over the land operates by way of re-grant from the grantee of the land, and is limited by the necessity which created it. — This re-grant, however, does not create a right to a way of necessity for all purposes for which the close may at any time be used, but only such a right of way as will enable the owner of the close to enjoy it as in the condition it happened to be at the time of the re-grant.—For instance, if at the time of the re-grant the close was agricultural land, the owner of the close can only claim such a right of way as is suitable to the enjoyment of land in that condition: he cannot claim a right of a way suitable to the user of the close as building land.—*Semble*, the same rule applies if the grant is of the landlocked close with an implied grant of a way of necessity over the surrounding land. CORPORATION OF LONDON *v.* RIGGS - - - 798

WILL—*Construction—Annuity to Children for their "Maintenance and Education"—Duration of.*] A testator by his will gave to a woman an annuity of £100, and directed as follows: "In the event of her death the annuity is to be continued to her children for their maintenance and education, and I have to request" *W. G.* "to see it carried into execution." The woman survived the testator and received the annuity up to her death, at which time all her six children had attained twenty-one:—*Held*, first, that the words "in the event of her death" could not be construed as only providing against a lapse of the annuity and that the annuity took effect in favour of the children:—Secondly, that the annuity was not confined to the minorities of the children, but was payable to them during their joint lives and to the survivors and survivor of them during their and his life, the children for the time being entitled as joint tenants.—*Soames* v. *Martin* (10 Sim. 287) followed.—*Gardner* v. *Barker* (18 Jur. 508) observed upon.—*Knapp* v. *Noyes* (Amb. 661) explained. WILKINS *v.* JODRELL - - 564

2. —— *Construction—Devise subject to Contingency—Effect on Subsequent Gifts.*] A testatrix devised an annuity, charged on the rental of a particular property, to her sister for her life, and after the sister's death she directed that the annuity should be applied by her executors in the

WILL—*continued.*

following manner: viz., that the annuity should be paid to her daughter *S.* during her life, but should *S.* die in the lifetime of the testatrix, or should she survive her, then after the death of *S.*, the testatrix directed her executors to pay the annuity to *L.*, a daughter of *S.*, during her life, and if *L.*, after having commenced to receive the annuity, should die before the expiration of the term for which the property on which the annuity was charged was let, then the testatrix directed her executors to continue to pay the annuity out of the rental to the then surviving children of *L.* in equal shares, and, in the event of there being then or at any future time no such surviving children of *L.*, then the testatrix directed her executors to pay the annuity out of the rental to the surviving children of *S.* in equal shares.—The testatrix died in 1854. *L.* died unmarried in 1870. *S.* died in 1875. The sister of the testatrix died in 1877:—*Held*, that the gift to the surviving children of *S.* was an independent and substantive gift, and not one of a series of gifts all dependent on *L.'s* having commenced to receive the annuity.—*Held*, therefore, that, on the death of the sister of the testatrix, the then surviving children of *S.* became entitled to the annuity. *In re* BLIGHT. BLIGHT *v.* HARTNOLL - - - - 858

3. —— *Construction—Direction to settle—Insertion of Power of Sale and Exchange.*] A testator, who made his will in 1810, and died in 1820, directed by his will that his daughters' shares in his property (which consisted of realty and personalty) should be so settled that, if they married, one-half of their fortune should be settled on them and their children, exclusive of their husbands:—*Held*, that this direction authorized the insertion in the settlement of a power of sale and exchange of that moiety of a daughter's share in the testator's real estate which was to be settled on her and her children.—*Turner* v. *Sargent* (17 Beav. 515) followed.—*Wheate* v. *Hall* (17 Ves. 80) distinguished. WISE *v.* PIPER - - 848

4. —— *Construction—Gift to A. for Life, and at his Decease to such Persons as he shall appoint—Power of Appointment by Deed or Will—Clear Gift followed by ambiguous Expression—Leaving Issue—Vested Interests.*] A gift by will to *A.* for life, and "at," or "after," his decease to such persons as he shall appoint, gives *A.* a life interest with a power of appointment either by instrument *inter vivos* or by will; there being no rule of construction under which a gift in such terms, unless controlled by the context, can be held to confer a testamentary power only.—Bequest of residue to *A.* for life, "the whole principal at her death to be divided amongst her children, if she has any, in such proportions as she shall think proper; and if she dies without leaving children," then over.—*A.* died without having exercised her power of appointment, and having had three children, of whom one only survived her:—*Held*, that the three children took vested interests liable to be divested by the exercise, either by instrument *inter vivos* or by will, of *A.'s* power of appointment; and accordingly that on *A.'s* death the residue became divisible in equal thirds between the surviving child and the representatives of the two deceased children. *In re* JACKSON'S WILL 189

WILL—*continued.*

5. —— *Construction—Life Interest—Superadded Power of Disposition inter vivos—Power or Property.*] A testator by his will gave realty and personalty to his widow "for the term of her natural life to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof," and "in the event of her decease should there be anything remaining of the said property or any part thereof," he gave "said part or parts thereof" to certain persons:—*Held*, that the widow of the testator took a life interest with an absolute power of disposition exerciseable by her during her lifetime, but not by testamentary instrument. *In re* Thomson's Estate. Herring *v.* Barrow - 144

6. —— *Construction—Tenant for Life—Gift to Children—Period of Distribution—Class entitled.*] Testator gave his estates, real and personal, upon trust to convert the personal, and after payment of debts, &c., to invest, and to permit *H. E.* during his life to receive the rents and income for his own benefit, and after his death, as to one undivided third part, for all the children of *H. E.* equally, the shares to be conveyed and paid to them as they should attain twenty-one, as to sons, and twenty-one or marriage as to daughters. There were clauses of maintenance, and accruer.—Testator gave another third part of the estates after the death of *H. E.* in favour of the children of his sister, and the remaining third part in trust for all and every the children of *G.*, the shares to be conveyed and paid at the ages and times above mentioned, and in case *H. E.* should die without children, the share given for them was to be divided between his sister's and *G.*'s children, as the two-thirds given to them. *H. E.* died a bachelor. At his death, *G.*, a widower, had two children. He married again, and when his eldest child attained twenty-one, he had six children, all of whom lived to attain twenty-one. Another child was born afterwards:—*Held*, by *Hall*, V.C., and by the Court of Appeal, that the six children, or their legal personal representatives, were entitled to a moiety of the estates.—*Berkeley* v. *Swinburne* (16 Sim. 275) explained. *In re* Emmet's Estate. Emmet *v.* Emmet - - C. A. 484

7. —— *Construction—Speaking from Death—Wills Act, ss.* 23, 24—*Bequest of Leasehold—Subsequent Purchase of the Fee.*] A testator gave to his wife all his term and interest in the leasehold house at *B.*, in which he then resided, for her absolute use and benefit, subject to the payment of the ground rent and performance of the covenants affecting the same. After the date of his will the testator purchased the freehold of the house at *B.*, which was conveyed to him in fee simple:—*Held*, that the house passed to the testator's widow, under the specific devise contained in the will, for an estate in fee simple. Saxton *v.* Saxton - - - - - 359

8. —— *Construction—Vesting of Legacy—Payment—Discretion of Trustees.*] Where a legacy is absolutely vested it cannot be divested by a subsequent gift over in the event of the legatee dying before he has received the legacy.—A testator gave his residuary estate in trust for all his children who should attain the age of twenty-one years, as tenants in common, but so that they should not be entitled to receive their respective shares until the youngest child attained the age of twenty-one years, unless the trustees of the will should in their discretion consider it proper that the shares, or any of them, should be paid; and the testator directed that in case any child should die before the youngest attained the age of twenty-one years and without having actually received his share, then that share should go over to the other children:—*Held*, that each child on attaining the age of twenty-one years acquired an indefeasibly vested interest in his share.—*In re Arrowsmith's Trusts* (2 D. F. & J. 474) observed upon, and *Johnson* v. *Crook* (12 Ch. D. 639) not followed. Bubb *v.* Padwick - - - - 517

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